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 TRAVELERS COMMERCIAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

TRAVELERS COMMERCIAL
 INSURANCE COMPANY, a
 Connecticut corporation,

Plaintiff,

v.

NEW YORK MARINE AND
 GENERAL INSURANCE COMPANY,
 a New York corporation,

Defendants.

Case No.: 2:21-cv-5832-GW (PDx)
 Hon. George H. Wu
 Hon. M.J. Patricia Donahue

**REQUEST FOR JUDICIAL
 NOTICE IN SUPPORT OF
 MOTION OF PLAINTIFF
 TRAVELERS COMMERCIAL
 INSURANCE COMPANY TO
 CONSOLIDATE ITS ACTION
 WITH ACTION FILED BY
 DEFENDANT NEW YORK
 MARINE AND GENERAL
 INSURANCE COMPANY
 AGAINST INSURED**

DATE: October 17, 2022
 TIME: 8:30 a.m.
 Courtroom: 9D

NEW YORK MARINE AND
 GENERAL INSURANCE COMPANY,
 a New York corporation,

Plaintiff,

v.

AMBER HEARD, an individual,

Defendant.

Case No. 2:22-cv-04685-GW (PDx)
 Hon. George H. Wu
 Hon. M.J. Patricia Donahue

1 TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

2 Pursuant to Rule 201(b) of the Federal Rules of Evidence, Plaintiff Travelers
3 Commercial Insurance Company (“Travelers”) hereby requests that the Court take
4 judicial notice of the attached exhibits in support of Travelers’ Motion to
5 Consolidate its Action with the Action filed by Defendant New York Marine and
6 General Insurance Company. Further, under Rule 201(c)(2), the Court “(2) must
7 take judicial notice if any party requests it and the court is supplied with the
8 necessary information.”

9 **Exhibit 1** – Travelers Commercial Insurance Company’s First Amended
10 Complaint for: (1) Declaratory Judgment; (2) Equitable Contribution of Defense
11 Expenses; Case No.: 2:21-cv-5832-GW-PD.

12 **Exhibit 2** – New York Marine and General Insurance Company’s Answer to First
13 Amended Complaint, Counterclaim, and Demand for Jury Trial; Case No.: 2:21-cv-
14 5832-GW-PD.

15 **Exhibit 3** – New York Marine and General Insurance Company’s First Amended
16 Complaint for Declaratory Relief and Demand for Jury Trial; Case No.: 2:22-cv-04685-
17 GW-PD (without exhibits).

18 **Exhibit 4** – Judgment Order in the action in the Circuit Court of Fairfax County
19 in Virginia, which was attached as an exhibit to Exhibit 3 to this Request.

20 **Exhibit 5** – Order re Transfer Pursuant to General Order 21-10 in Case 2:22-cv-
21 04685-GW-PD.

22 Dated: August 24, 2022

23 Respectfully submitted,

24
25 /s/ Mark D. Peterson
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27 Of CATES PETERSON LLP
28 Attorneys for Plaintiff
TRAVELERS COMMERCIAL
INSURANCE COMPANY

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13 INSURANCE COMPANY

14 **UNITED STATES DISTRICT COURT**
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16 TRAVELERS COMMERCIAL
17 INSURANCE COMPANY, a
18 Connecticut corporation,

19 Plaintiff,

20 v.

21 NEW YORK MARINE AND
22 GENERAL INSURANCE COMPANY,
23 a New York corporation,

24 Defendants.

25) Case No.: 2:21-cv-5832-GW (PDx)
26) Hon. George H. Wu
27) Hon. MJ Patricia Donahue

28 **FIRST AMENDED COMPLAINT
FOR:**

**(1) DECLARATORY JUDGMENT;
(2) EQUITABLE CONTRIBUTION
OF DEFENSE EXPENSES.**

1 Plaintiff Travelers Commercial Insurance Company (“Travelers”) alleges as
2 follows:

3 **GENERAL ALLEGATIONS**

4 **Introduction**

5 1. Defendant New York Marine and General Insurance Company’s
6 (“ProSight”) failure to meet its obligation to provide its and Travelers’ mutual
7 insured—a California resident—with independent counsel to defend the insured in
8 an underlying defamation action is a breach of its insurance policy and its
9 obligations. It has unfairly forced Travelers to pay ProSight’s proper share of
10 defense costs. Travelers has been damaged by this conduct and it is entitled to
11 judgment in the form of a declaration that ProSight was obligated to provide the
12 mutual insured with a proper defense. Moreover, under the doctrine of equitable
13 contribution, Travelers is entitled to reimbursement from ProSight of at least half of
14 the monies that Travelers has spent so far to defend their mutual insured with proper
15 counsel and adequate experts and vendors.

16 **Jurisdiction and Venue**

17 2. Plaintiff Travelers is now, and at all relevant times was, a corporation
18 existing under the laws of the State of Connecticut, with its principal place of
19 business in Hartford, Connecticut. Travelers is, and at all relevant times was, an
20 insurance carrier eligible to do business and doing business as an insurer in the State
21 of California.

22 3. Travelers is informed and believes and, on that basis, alleges that defendant
23 ProSight is a corporation existing under the laws of the State of New York, with its
24 principal place of business in Morristown, New Jersey. Travelers is further
25 informed and believes and, on that basis, alleges that ProSight is, and at all times
26 relevant was, an insurance carrier eligible to do business and doing business as an
27 insurer in the State of California.

1 4. This Court has original jurisdiction under 28 U.S.C. § 1332(a)(1) in that
2 this is a civil action between citizens of different states in which the matter in
3 controversy exceeds, exclusive of costs and interest, seventy-five thousand dollars.
4 The amount in controversy exceeds \$75,000; it is comprised of the monies in
5 defense costs paid by Travelers to defend the insurers' mutual insured with capable
6 and active counsel, at least half of which should have been paid by ProSight. This
7 Court has diversity jurisdiction because plaintiff Travelers is incorporated in
8 Connecticut and domiciled in Connecticut and defendant ProSight is incorporated in
9 New York and domiciled in New Jersey.

10 5. This Court has personal jurisdiction over the parties because: (a) Travelers
11 and ProSight transact insurance business in California, with significant and
12 continuing contacts in California, (b) this lawsuit arises out of insurance contracts
13 sold and delivered by Travelers and ProSight in California, to a California insured,
14 and (c) defendant ProSight operated its business continuously in California.

15 6. Venue is proper in this District under 28 U.S.C. § 1391(b), (c) and (d)
16 because Travelers and ProSight have sufficient contacts to be subject to personal
17 jurisdiction in this district and thus are residents of this district under
18 28 U.S.C. § 1391(d). Moreover, a substantial part of the events which are the
19 subject of the claims asserted here took place in this judicial district, including that
20 the underlying defense has involved extensive activities in the County of Los
21 Angeles, State of California.

22 **The Travelers Policy**

23 7. Travelers issued homeowners policy no. 601627108 634 1 to the mutual
24 insured for the policy period beginning November 14, 2018, and ending November
25 14, 2019 (the "Travelers Policy"). The Travelers Policy was issued / delivered to the
26 mutual insured in California. The coverage provided by the Travelers Policy extends
27 to otherwise covered or potentially covered damages because of defamation. The
28

1 Travelers Policy promised a defense to any lawsuit seeking such damages.

2 **The ProSight Policy**

3 8. ProSight issued commercial general liability insurance, policy
4 no. GL201800012500, policy period July 18, 2018, to July 18, 2019 (the “ProSight
5 Policy”). The ProSight Policy was issued / delivered to the mutual insured in
6 California. The coverage provided by the ProSight Policy extends to otherwise
7 covered or potentially covered damages because of defamation. The ProSight Policy
8 promised a defense to any lawsuit seeking such damages.

9 **The Underlying Defamation Action**

10 9. In or about March 2019, the mutual insured—a California resident—was
11 sued in Virginia state court (“the Underlying Action”). The lawsuit seeks damages
12 for defamation, potentially covered under the Travelers Policy and the ProSight
13 Policy, so each owed the mutual insured a defense from the date the action was
14 tendered to it.

15 **Travelers’ Response to the Tender**

16 10. Travelers agreed to defend the mutual insured with respect to the
17 Underlying Action under a reservation of rights. In light of its reservation of rights
18 and California law, including the holding of *San Diego Navy Federal Credit Union*
19 *v. Cumis Insurance Society* (“Cumis”), 162 Cal. App. 3d 358 (1984), Civil Code
20 section 2860, and Civil Code section 1646, Travelers offered to pay for independent
21 defense counsel of the mutual insured’s own selection, subject to the rate limitations
22 of California Civil Code section 2860. Travelers has paid the fees of the mutual
23 insured’s independent defense counsel.

24 **ProSight’s Response To The Tender**

25 11. ProSight accepted its obligation to defend the insured under a reservation
26 of rights. ProSight’s reservation triggered the mutual insured’s right to independent
27 defense counsel under California law, under the holding of *Cumis*, Civil Code
28

1 section 2860, and Civil Code section 1646, “when an insurer reserves its rights on a
2 given issue and the outcome of that coverage issue can be controlled by counsel first
3 retained by the insurer for the defense of the claim, a conflict of interest may exist.”

4 12. ProSight’s reservation of rights letter—like Travelers’ reservation of
5 rights letter—indicated that indemnity coverage could be denied based on the
6 insured’s knowledge and / or intent with respect to the alleged events giving rise to
7 the Underlying Action. In other words, “the outcome of that coverage issue[s]”
8 raised by ProSight could “be controlled by counsel first retained by the insurer for
9 the defense of the claim.”

10 13. ProSight nonetheless did not agree to provide the mutual insured with
11 independent defense counsel.

12 14. ProSight instead attempted to evade its obligation to appoint independent
13 defense counsel by avoiding citation to certain policy provisions in its reservation of
14 rights letter, and it encouraged Travelers to do likewise, to the detriment of the
15 mutual insured.

16 15. ProSight sent an email to Travelers on September 30, 2019, encouraging
17 Travelers to revise its reservation of rights in such a way as to avoid having to
18 provide the mutual insured with independent defense counsel. The ProSight email
19 stated in part as follows:

20 Reserving rights under the intentional acts exclusion is not necessary as
21 coverage for willful acts is not insurable as a matter of public policy just like
22 punitive damages. . . .

23 If you reserve rights by simply saying, “to the extent that California law does
24 not permit an insurer to indemnify the insured, no indemnity can be provided”
25 you address both willful acts and punitive damages . . . and you still can
26 control the defense as there is no conflict of interest under CA law. ...

1 16. Travelers refused to collaborate or participate in ProSight's scheme and
2 has repeatedly demanded that ProSight pay its share of the mutual insured's
3 independent defense counsel fees and costs.

4 17. ProSight instead appointed defense counsel of *its* choice and it repeatedly
5 refused demands by the mutual insured and by Travelers to participate in the defense
6 with counsel of the mutual insured's choosing.

7 18. ProSight compounded its breach of the duty to defend by having its
8 appointed counsel do next to nothing and "piggy-back" on the work of the mutual
9 insured's independent defense counsel, paid for by Travelers.

10 19. ProSight's appointed counsel withdrew from representation of the mutual
11 insured on November 20, 2020.

12 20. ProSight advised Travelers on January 21, 2021 that it would pay 50% of
13 the fees and costs incurred by independent defense counsel on and after November
14 20, 2020.

15 21. Travelers acknowledged ProSight's agreement but demanded that
16 ProSight also pay the same percentage for fees and costs incurred by independent
17 defense counsel between the date of tender to ProSight and November 20, 2020.

18 22. To date, ProSight has not paid any portion of any fees or costs incurred by
19 independent defense counsel in defense of the mutual insured.

20 23. To date, ProSight has not reimbursed Travelers for any portion of any
21 fees or costs incurred by independent defense counsel in defense of the mutual
22 insured.

23 24. ProSight has indicated that after trial, it likely will attempt to deny
24 coverage for any award against the mutual insured based on its reservation of rights.

25 25. ProSight has most recently argued that its defense obligations should be
26 determined under the law of Virginia, despite having repeatedly invoked California
27 law in its communications with its California insured and Travelers.

1 26. ProSight's deceptive conduct should not be tolerated, much less
2 rewarded, by allowing it to avoid its defense obligations and forcing Travelers to
3 foot the entire bill for the mutual insured's proper defense.

4 27. ProSight is obligated to reimburse Travelers for at least 50% of the
5 independent defense counsel fees and costs paid by Travelers, plus interest, and it is
6 further obligated to pay at least 50% of those fees and costs going forward.

7 28. An actual case or controversy exists between Travelers and ProSight
8 regarding ProSight's obligation to reimburse Travelers and pay for the mutual
9 insured's independent defense counsel.

10 **FIRST CLAIM FOR RELIEF:**

11 **DECLARATORY JUDGMENT**

12 29. Travelers incorporates the allegations of Paragraph 1 through 28 as if set
13 forth in full here.

14 **This Dispute**

15 30. Travelers and ProSight disagree about a host of issues regarding the
16 parties' rights and obligations as they pertain to the insured, the insurance policies,
17 and the Underlying Action.

18 31. *Travelers seeks the following declarations against ProSight regarding*
19 *their mutual insured and the Underlying Action:*

20 a. Duty to Defend: Since the Underlying Action was tendered to it,
21 and through the present, ProSight has been obligated under the ProSight
22 Policy to defend the insured;

23 b. Duty to Defend with Independent Defense Counsel: Since the
24 Underlying Action was tendered to it, and through the present, ProSight has
25 been obligated to provide the insured with a defense with independent
26 defense counsel of the insured's choosing;

1 c. Breach of its Duty to Defend: ProSight has failed to meet its duty to
2 defend the insured in the Underlying Action. It has failed to properly defend
3 the insured with independent defense counsel of the insured's choosing, which
4 was its obligation. Alternatively, even if the Court determines that ProSight
5 was not obligated to defend the insured with independent defense counsel of
6 the insured's choosing, either because California law does not apply or for
7 some other reason, ProSight still breached its duty to defend the insured by
8 failing to provide it an adequate defense. This failure includes not paying
9 attorneys to do adequate work to defend the insured and not replacing its
10 chosen Virginia attorneys at all when they withdrew from the defense;

11 d. Obligation to Reimburse Travelers: ProSight has an obligation to
12 reimburse Travelers for at least half of the fees, costs, and expenses incurred
13 by Travelers in the defense of the mutual insured in the Underlying Action,
14 plus interest; and

15 e. Obligation to Pay Fees and Costs Incurred By Independent Counsel
16 Going Forward: ProSight has an obligation to pay least half of the fees, costs,
17 and expenses incurred by independent defense counsel on a going forward
18 basis.

19 32. Travelers is informed and believes that ProSight disputes Travelers' right
20 to each and every one of the foregoing declarations.

21 33. Declaratory relief is appropriate and necessary and the Court should
22 exercise its jurisdiction over this matter under the Declaratory Judgment Act, 28
23 U.S.C. §§ 2201-2202, because Travelers has no other plan, speedy, and/or adequate
24 remedy at law.

25 34. For the reasons stated above, Travelers requests that the Court enter an
26 order and judgment declaring each of these disputed matters in Travelers' favor and
27

1 against ProSight and, further, that it make a monetary award and judgment in
2 Travelers' favor against ProSight consistent with its declarations.

3 **SECOND CLAIM FOR RELIEF:**
4 **EQUITABLE CONTRIBUTION OF**
5 **DEFENSE EXPENSES IN**
6 **UNDERLYING ACTION**

7 35. Travelers incorporates the allegations of paragraphs 1 through 28 and 30
8 through 34 as if set forth in full here.

9 36. Travelers and ProSight each owe the insured a defense in the Underlying
10 Action with independent defense counsel. As to the duty to defend the mutual
11 insured, they cover the same risk, Travelers paid more than its fair share, and
12 ProSight should have paid its share, but didn't. ProSight is obligated to pay at least
13 half of that defense expense.

14 37. Travelers has spent and continues to spend substantial sums toward the
15 mutual insured's defense in the Underlying Action with independent defense counsel
16 of the mutual insured's choosing, as well as other counsel, experts, and vendors
17 necessary to defend the insured. The case continues and the amount incurred by
18 Travelers continues to grow.

19 38. For its part, rather than pay half, ProSight has not reimbursed the insured
20 or Travelers anything, and it has not adequately funded a defense of its own. It has
21 not actually defended by any objective measure.

22 39. Travelers has demanded that ProSight reimburse Travelers for half of the
23 attorney's fees, costs, and expenses of the independent defense counsel defending
24 their mutual insured in the Underlying Action and, further, that ProSight pay half of
25 those attorney's fees, costs, and expenses going forward.

26 40. ProSight owes that, but it has refused to reimburse Travelers or pay any
27 fees of the mutual insured's independent defense counsel, despite having committed
28

1 to participate in the defense and split the fees and costs incurred by independent
2 defense counsel on and after November 20, 2020.

3 41. In addition to declaratory relief, Travelers seeks a money judgment of
4 equitable contribution of at least half of the attorney's fees, costs, and expenses of
5 defending the insured in the Underlying Action, plus interest. Equity compels this
6 result under the circumstances of this dispute.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, plaintiff Travelers prays for an order and judgment against
9 defendant ProSight as follows:

10 1. Declaring that

11 a. Duty to Defend: Since the Underlying Action was tendered to it,
12 and through the present, ProSight has been obligated under the ProSight
13 Policy to defend the mutual insured;

14 b. Duty to Defend with Independent Defense Counsel: Since the
15 Underlying Action was tendered to it, and through the present, ProSight has
16 been obligated to provide the mutual insured with a defense with independent
17 defense counsel of the insured's choosing;

18 c. Breach of its Duty to Defend: ProSight has failed to meet its duty to
19 defend the mutual insured in the Underlying Action. It has failed to properly
20 defend the insured with independent defense counsel of the insured's
21 choosing, which was its obligation; Alternatively, even if the Court
22 determines that ProSight was not obligated to defend the insured with
23 independent defense counsel of the insured's choosing, either because
24 California law does not apply or for some other reason, ProSight still breached
25 its duty to defend the insured by failing to provide it an adequate defense.
26 This failure includes not paying attorneys to do adequate work to defend the
27
28

1 insured and not replacing its chosen Virginia attorneys at all when they
 2 withdrew from the defense;

3 d. Obligation to Reimburse Travelers: ProSight has an obligation to
 4 reimburse Travelers for at least half of the fees, costs, and expenses incurred
 5 by Travelers in the defense of the mutual insured in the Underlying Action;
 6 and

7 e. Obligation to Pay Fees and Costs Incurred By Independent Counsel
 8 Going Forward: ProSight has an obligation to pay least half of the fees, costs,
 9 and expenses incurred by independent defense counsel on a going forward
 10 basis;

11 2. Enjoining ProSight from refusing to participate in the defense of the
 12 Underlying Action via independent defense counsel of the mutual insured's choosing,
 13 and ordering ProSight to pay at least 50% of the attorney's fees, costs, and expenses
 14 incurred by independent defense counsel going forward ;

15 3. Awarding Travelers a money judgment of at least half of the attorney's
 16 fees, costs, and expenses it has paid defending the mutual insured in the Underlying
 17 Action through counsel of the mutual insured's choosing;

18 4. Awarding interest on all such sums at 10% (Cal. Civ. Code §§ 3287(a) and
 19 3289) or as otherwise provided for by the Court;

20 5. Awarding costs of suit; and

21 6. Awarding all other relief which the Court finds just and proper.

22 Dated: September 7, 2021

23 Respectfully submitted,

24
 25 /s/ Mark D. Peterson
 26 MARK D. PETERSON
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 28 Attorneys for Plaintiff
 TRAVELERS COMMERCIAL
 INSURANCE COMPANY

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10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

12
13 Travelers Commercial Insurance
Company, a Connecticut Corporation,

14 Plaintiff,

15 v.

16 New York Marine and General
17 Insurance Company, a Delaware
Corporation,

18 Defendant.
19

Case No. 2:21-cv-5832-GW (PDx)

**DEFENDANT NEW YORK
MARINE AND GENERAL
INSURANCE COMPANY'S
ANSWER TO FIRST AMENDED
COMPLAINT, COUNTERCLAIM,
AND DEMAND FOR JURY TRIAL**

Hon. George H. Wu

20 COMES NOW DEFENDANT NEW YORK MARINE AND GENERAL
21 INSURANCE COMPANY ("NEW YORK MARINE") and Answers the First
22 Amended Complaint of PLAINTIFF TRAVELERS COMMERCIAL INSURANCE
23 COMPANY ("Travelers") as follows:

24 1. Answering Paragraph 1, NEW YORK MARINE submits that the
25 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
26 to the extent a response is required, denies the allegation that it "fail[ed] to meet its
27 obligation to provide its and Travelers' mutual insured ... with independent counsel
28

1 to defend the insured in an underlying defamation action”, and further denies that it
2 “breached ... its insurance policy and its obligations” to its insured. NEW YORK
3 MARINE further denies that “[i]t has unfairly forced Travelers to pay [NEW YORK
4 MARINE’S] proper share of defense costs”, and so also denies the allegations therein
5 that Travelers has been damaged in any way on account of any conduct by NEW
6 YORK MARINE, that Travelers is entitled to judgment or a declaration, and further
7 denies the allegation implied therein that NEW YORK MARINE failed to provide the
8 insured “with a proper defense.” NEW YORK MARINE further denies that the
9 allegation therein that “Travelers is entitled to reimbursement from NEW YORK
10 MARINE” of amounts that Travelers has spent to defend the mutual insured, whether
11 by way of equitable contribution or any other claim or cause of action, and denies the
12 implied allegation therein that it failed to “defend the[] mutual insured with proper
13 counsel and adequate experts and vendors.”

14 2. Answering Paragraph 2, NEW YORK MARINE admits the allegations
15 therein.

16 3. Answering Paragraph 3, NEW YORK MARINE denies the allegation
17 therein that “ProSight” is a “corporation existing under the law of the State of New
18 York, with its principal place of business in Morristown, New Jersey”. NEW YORK
19 MARINE further denies that “ProSight is, and at all times relevant was, an insurance
20 carrier eligible to do business and doing business as an insurer in the State of
21 California”—indeed, inasmuch as “ProSight” is not a named defendant in the present
22 action, it is unclear to NEW YORK MARINE why the allegations concerning
23 “ProSight” are alleged herein. In light of the foregoing, NEW YORK MARINE also
24 denies the allegation therein that “ProSight” is a “corporation existing under the law
25 of the State of New York,” and denies the allegation that its “principal place of
26 business in Morristown, New Jersey”, to the extent that Travelers intends but fails to
27 assert that allegation against NEW YORK MARINE, as NEW YORK MARINE is a
28 company existing under the laws of the State of Delaware with a principal place of

1 business in New York City within the State of New York. NEW YORK MARINE
2 further admits that it is an insurer “eligible to do business and doing business as an
3 insurer in the State of California.”

4 4. Answering Paragraph 4, NEW YORK MARINE admits the allegation
5 that the matter is subject to the jurisdiction of this Court based on the amount in
6 controversy and the diversity of citizenship between the parties. However, NEW
7 YORK MARINE denies the allegation that any sums “should have been paid by
8 ProSight”, and further denies that it is “incorporated in New York”, inasmuch as it is
9 incorporated in Delaware, and has a principal place of business in New York City in
10 the state of New York.

11 5. Answering Paragraph 5, NEW YORK MARINE admits the allegation
12 that the Court has personal jurisdiction over the parties based on the fact that the
13 dispute arises over policies of insurance issued in California, and admits that it
14 operated its business continuously in California as an insurer at all times relevant to
15 the present complaint.

16 6. Answering Paragraph 6, NEW YORK MARINE admits the allegation
17 that venue is proper in this judicial district because the dispute arises out of policies
18 of insurance issued in this district, but denies the remaining allegations that “a
19 substantial part of the events which are the subject of the claims asserted here took
20 place in this judicial district, including that the underlying defense has involved
21 extensive activities in the County of Los Angeles.”

22 7. Answering Paragraph 7, NEW YORK MARINE admits the allegations
23 therein.

24 8. Answering Paragraph 8, NEW YORK MARINE has insufficient
25 information to admit or deny whether the insured is a California resident and so denies
26 that allegation, but admits that the insured was “sued in Virginia state court”. NEW
27 YORK MARINE further admits that the Underlying Action “seeks damages for
28 defamation”, and admits that the Underlying Action originally obligated both

1 Travelers and New York Marine to defend the insured, to the extent such obligation
2 was or is not otherwise excused. However, NEW YORK MARINE denies that it has
3 an ongoing obligation to defend the insured in light of: (1) the insured's refusal of the
4 defense properly provided by NEW YORK MARINE through appointed defense
5 counsel; and/or (2) the refusal of independent counsel retained by the insured and
6 funded by Travelers to cooperate with or facilitate the participation of defense counsel
7 appointed by NEW YORK MARINE, and Travelers' unclean hands with respect to
8 that lack of cooperation including by way of its failure to require that independent
9 counsel which it approved and appointed cooperate with and facilitate the active
10 participation of NEW YORK MARINE's appointed counsel in the defense.

11 9. Answering Paragraph 9, NEW YORK MARINE admits the allegations
12 therein to the extent that the allegations of the complaint in the underlying action
13 originally triggered Travelers' and NEW YORK MARINE'S respective duties to
14 defend the insured, but denies that NEW YORK MARINE has an ongoing obligation
15 to defend the insured in light of: (1) the insured's refusal of the defense properly
16 provided by NEW YORK MARINE through appointed defense counsel; and/or (2)
17 the refusal of independent counsel retained by the insured and funded by Travelers to
18 cooperate with or facilitate the participation of defense counsel appointed by NEW
19 YORK MARINE, and Travelers' unclean hands with respect to that lack of
20 cooperation including by way of its failure to require that independent counsel
21 cooperate with and facilitate the active participation of NEW YORK MARINE's
22 appointed counsel in the defense.

23 10. Answering Paragraph 10, NEW YORK MARINE admits the allegation
24 therein that Travelers "agreed to defend the mutual insured" in the Underlying Action
25 "under a reservation of rights". However, to the extent that the lead counsel retained
26 by the insured and funded by Travelers to defend the Underlying Action was licensed
27 in Virginia and not California, NEW YORK MARINE denies the allegation therein
28 that Travelers' "reservation of rights and California law" imposed any obligation on

Travelers to provide a defense to the insured through independent counsel, whether under *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, 162 Cal.App.3d 358 (1984), Civil Code § 2860, and/or Civil Code § 1646, since under Virginia law, even when retained by an insurer defense counsel has only the insured as a client, and so no conflict exists which would trigger the insured's right to independent counsel under Civil Code § 2860, as previously held by this Court in its January 6, 2022 Order. Nevertheless, responding to that allegation, NEW YORK MARINE admits that Travelers "offered to pay for independent defense counsel of the mutual insured's own selection" and consequently assumed a duty to provide independent counsel to the insured. NEW YORK MARINE further denies the allegation therein that "Travelers offered to pay for independent defense counsel of the mutual insured's own selection, subject to the rate limitations of California Civil Code section 2860", since Travelers instead agreed to pay independent counsel its substantially higher hourly rates, and only subsequently required that independent counsel accept "the rate limitations of California Civil Code section 2860" in or about May 2021. Subject to the foregoing, NEW YORK MARINE admits the allegation therein that "Travelers has paid the fees of the mutual insured's independent defense counsel", but lacks sufficient information to determine whether Travelers has paid all or merely some portion of such fees, and consequently denies the allegations to the extent they impliedly allege that Travelers has paid 100% of all fees and costs incurred to date.

11. Answering Paragraph 11, NEW YORK MARINE admits the allegation therein that it "accepted its obligation to defend the insured under a reservation of rights", but denies the remaining allegations therein that its "reservation of rights triggered the mutual insured's right to independent counsel under California law, under the holding of *Cumis*, Civil Code Section 2860, and Civil Code section 1646", since, as the Court concluded in its January 6, 2022 Order, the reservation of rights issued by NEW YORK MARINE is a "general" reservation of rights which "is not

1 sufficient to create a duty on the insurer to provide independent counsel”. NEW
2 YORK MARINE further denies the allegation since, as also held by the Court in its
3 January 6, 2022 Order, “under California law [NEW YORK MARINE] would not
4 have such obligation because the Virginia lawyer [retained by NEW YORK
5 MARINE] – whose professional conduct is unquestionably governed/measured by
6 Virginia law – has no undivided loyalty.”

7 12. Answering Paragraph 12, NEW YORK MARINE denies the allegations
8 therein that its “reservation of rights letter—like Travelers’ reservation of rights
9 letter—indicated that indemnity coverage could be denied based on the insured’s
10 knowledge and / or intent with respect to the alleged events giving rise to the
11 Underlying Action”, since as held by the Court in its January 6, 2022 Order, the
12 reservation of rights issued by NEW YORK MARINE is a “general” reservation of
13 rights which “is not sufficient to create a duty on the insurer to provide independent
14 counsel”. NEW YORK MARINE further denies the allegation since, as also held by
15 the Court in its January 6, 2022 Order, “under California law [NEW YORK
16 MARINE] would not have such obligation because the Virginia lawyer [retained by
17 NEW YORK MARINE] – whose professional conduct is unquestionably
18 governed/measured by Virginia law – has no undivided loyalty.”

19 13. Answering Paragraph 13, NEW YORK MARINE admits that it “did not
20 agree to provide the mutual insured with independent defense counsel”, but to the
21 extent the allegations therein imply that it had an obligation to do so, denies such
22 obligation since as held by the Court in its January 6, 2022 Order, the reservation of
23 rights issued by NEW YORK MARINE is a “general” reservation of rights which “is
24 not sufficient to create a duty on the insurer to provide independent counsel”. NEW
25 YORK MARINE further denies the allegation since, as also held by the Court in its
26 January 6, 2022 Order, “under California law [NEW YORK MARINE] would not
27 have such obligation because the Virginia lawyer [retained by NEW YORK
28 MARINE] – whose professional conduct is unquestionably governed/measured by

1 Virginia law – has no undivided loyalty.”

2 14. Answering Paragraph 14, NEW YORK MARINE denies the allegations
3 therein.

4 15. Answering Paragraph 15, NEW YORK MARINE admits the allegations
5 therein, and observes that its position was confirmed correct by the Court as reflected
6 in its January 6, 2022 Order holding that NEW YORK MARINE’s reservation of
7 rights letter did not trigger the insured’s right to independent “*Cumis*” counsel under
8 Civil Code § 2860.

9 16. Answering Paragraph 16, NEW YORK MARINE denies the allegations
10 therein, and in particular, denies that NEW YORK MARINE was engaged in any
11 “scheme” to deny the insured’s rights—a position again confirmed correct by the
12 Court as reflected in its January 6, 2022 Order holding that NEW YORK MARINE’s
13 reservation of rights letter did not trigger the insured’s right to independent “*Cumis*”
14 counsel under Civil Code § 2860.

15 17. Answering Paragraph 17, NEW YORK MARINE admits the allegations
16 therein to the extent that it appointed defense counsel, but denies the allegation to the
17 extent it alleges that the insured opposed retention of the counsel so-appointed by
18 NEW YORK MARINE inasmuch as the counsel which NEW YORK MARINE
19 appointed *had originally been retained by the insured* to represent her in the defense
20 of the Underlying Action.

21 18. Answering Paragraph 18, NEW YORK MARINE denies the allegations
22 therein that it “ha[d] its appointed counsel do next to nothing and ‘piggy-back’ on the
23 work of the mutual insured’s independent defense counsel, paid for by Travelers”, as
24 NEW YORK MARINE in fact intended and instructed its appointed defense counsel
25 to act as “lead counsel” with respect to the defense of the Underlying Action. NEW
26 YORK MARINE further denies the allegation since any failure of appointed counsel
27 to participate fully in the defense of the insured was the result of the affirmative
28 refusal of independent counsel retained by the insured and funded by Travelers to

1 cooperate with, and its active obstruction of, the participation of NEW YORK
2 MARINE's appointed counsel.

3 19. Answering Paragraph 19, NEW YORK MARINE generally admits the
4 allegation therein, and denies the same only to the extent that counsel withdrew on
5 November 6, 2020, rather than November 20, 2020.

6 20. Answering Paragraph 20, NEW YORK MARINE generally admits the
7 allegations therein, and denies the same only to the extent that counsel withdrew on
8 November 6, 2020, rather than November 20, 2020. NEW YORK MARINE further
9 denies the allegation therein to the extent that the allegation does not reflect that NEW
10 YORK MARINE's agreement was subject to a reservation of all of NEW YORK
11 MARINE'S rights.

12 21. Answering Paragraph 21, NEW YORK MARINE denies the allegation
13 that "Travelers acknowledged [NEW YORK MARINE'S] agreement", but admits the
14 allegation that Travelers demanded that NEW YORK MARINE reimburse Travelers
15 for sums incurred by independent counsel retained by the insured and funded by
16 Travelers from the date of the insured's tender; however, NEW YORK MARINE
17 further denies the allegations therein to the extent that appointed defense counsel
18 withdrew from the defense on November 6, 2020, rather than November 20, 2020.

19 22. Answering Paragraph 22, NEW YORK MARINE denies the allegation
20 therein as NEW YORK MARINE has previously paid Travelers the sum of
21 \$621,693.43.

22 23. Answering Paragraph 23, NEW YORK MARINE denies the allegation
23 therein as NEW YORK MARINE has previously paid Travelers the sum of
24 \$621,693.43.

25 24. Answering Paragraph 24, NEW YORK MARINE acknowledges that it
26 extended a defense to the mutual insured subject to a reservation of its rights—as
27 Travelers itself has done—and so denies the allegation therein to the extent that it
28 implies that NEW YORK MARINE's provision of a defense pursuant to routine and

1 legally-recognized reservation of its rights—just like Travelers has done—somehow
2 reflects a “scheme” or a deliberate intent by NEW YORK MARINE to *wrongfully*
3 deny the insured the benefit of the NEW YORK MARINE policy. NEW YORK
4 MARINE further denies that it has “indicated” any particular position to the insured,
5 to Travelers, or to any other person or entity, with respect to the coverage available to
6 the insured, including the availability or non-availability of indemnity for the insured,
7 beyond the “general” reservation of rights pursuant to which it originally assumed the
8 insured’s defense as acknowledged in the Court’s January 6, 2022 Order. In addition,
9 NEW YORK MARINE denies the remaining allegations of paragraph 24 in their
10 entirety.

11 25. Answering Paragraph 25, NEW YORK MARINE denies the allegation
12 therein “that its defense obligations should be determined under the law of Virginia”,
13 as New York Marine’s position is that it is the relationship between the insured, the
14 insured’s Virginia-based and licensed defense counsel, and the insurer which is
15 governed by Virginia law, for purposes of ascertaining NEW YORK MARINE’s
16 obligations under California law.

17 26. Answering Paragraph 26, NEW YORK MARINE submits that the
18 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
19 nevertheless denies the allegations therein to the extent they relate the substance of
20 the dispute at hand.

21 27. Answering Paragraph 27, NEW YORK MARINE denies the allegations
22 therein.

23 28. Answering Paragraph 28, NEW YORK MARINE admits the allegations
24 therein.

25 29. Answering Paragraph 29, NEW YORK MARINE restates the
26 admissions and denials previously set forth in paragraphs 1- 28 as appropriate.

27 30. Answering Paragraph 30, NEW YORK MARINE submits that the
28 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but

1 admits that a present controversy exists between Travelers and NEW YORK
2 MARINE as to NEW YORK MARINE'S obligations with respect to the defense of
3 the insured in the Underlying Action and as to Travelers' entitlement to recovery from
4 NEW YORK MARINE of sums incurred by Travelers in connection with the defense
5 provided through independent counsel retained by the insured and funded by
6 Travelers.

7 31. Answering Paragraph 31, NEW YORK MARINE admits the allegation
8 of subpart a. therein that it originally had a duty to defend the insured except to the
9 extent otherwise excused. However, NEW YORK MARINE denies that it has an
10 ongoing obligation to defend the insured in light of: (1) the insured's refusal of the
11 defense properly provided by NEW YORK MARINE through appointed defense
12 counsel; and/or (2) the refusal of independent counsel retained by the insured and
13 funded by Travelers to cooperate with or facilitate the participation of defense counsel
14 appointed by NEW YORK MARINE, and Travelers' unclean hands with respect to
15 that lack of cooperation including by way of its failure to require that independent
16 counsel which it approved and appointed cooperate with and facilitate the active
17 participation of NEW YORK MARINE's appointed counsel in the defense.

18 Answering subpart b. therein, NEW YORK MARINE denies the allegation that
19 it had or has any duty to provide defense through "independent counsel of the
20 insured's choosing", since as held by the Court in its January 6, 2022 Order, the
21 reservation of rights issued by NEW YORK MARINE is a "general" reservation of
22 rights which "is not sufficient to create a duty on the insurer to provide independent
23 counsel". NEW YORK MARINE further denies the allegation since, as also held by
24 the Court in its January 6, 2022 Order, "under California law [NEW YORK
25 MARINE] would not have such obligation because the Virginia lawyer [retained by
26 NEW YORK MARINE] – whose professional conduct is unquestionably
27 governed/measured by Virginia law – has no undivided loyalty."

28 Answering subpart c. therein, NEW YORK MARINE denies the allegations

1 that it breached its duty to defend, either by refusing to provide the insured “with
2 independent defense counsel of the insured’s choosing”, or by “failing to provide [the
3 insured] an adequate defense”, and further denies that allegations that it breached the
4 duty to defend by “not paying its attorneys to do adequate work to defend the insured
5 and not replacing its chosen Virginia attorneys at all when they withdrew from the
6 defense”. Answering subpart d. therein, NEW YORK MARINE further denies the
7 allegations therein. Furthermore, answering subpart e. therein, NEW YORK
8 MARINE denies that it “has an obligation to pay [at] least half of the fees, costs, and
9 expenses incurred by independent defense counsel on a going forward basis” to the
10 extent that NEW YORK MARINE may provide a defense to the insured through
11 counsel it appoints, and/or to the extent that its ongoing obligation to provide a
12 defense to the insured has been excused in light of: (1) the insured’s refusal of the
13 defense properly provided by NEW YORK MARINE through appointed defense
14 counsel; and/or (2) the refusal of independent counsel retained by the insured and
15 funded by Travelers to cooperate with or facilitate the participation of defense counsel
16 appointed by NEW YORK MARINE, and Travelers’ unclean hands with respect to
17 that lack of cooperation including by way of its failure to require that independent
18 counsel which it approved and appointed cooperate with and facilitate the active
19 participation of NEW YORK MARINE’s appointed counsel in the defense.

20 32. Answering Paragraph 32, NEW YORK MARINE submits that the
21 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
22 admits that a present controversy exists between Travelers and NEW YORK
23 MARINE as to NEW YORK MARINE’S obligations with respect to the defense of
24 the insured in the Underlying Action and as to Travelers’ entitlement to recovery from
25 NEW YORK MARINE of sums incurred by TRAVELERS in connection with the
26 defense provided through independent counsel retained by the insured and funded by
27 Travelers.

28 33. Answering Paragraph 33, NEW YORK MARINE submits that the

1 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
2 admits that a present controversy exists between Travelers and NEW YORK
3 MARINE as to NEW YORK MARINE'S obligations with respect to the defense of
4 the insured in the Underlying Action and as to Travelers' entitlement to recovery from
5 NEW YORK MARINE of sums incurred by TRAVELERS in connection with the
6 defense provided through independent counsel retained by the insured and funded by
7 Travelers.

8 34. Answering Paragraph 34, NEW YORK MARINE submits that the
9 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
10 otherwise denies Travelers' entitlement to the relief requested therein.

11 35. Answering Paragraph 35, NEW YORK MARINE restates the
12 admissions and denials previously set forth in paragraphs 1-28 and 30-34 above as
13 appropriate.

14 36. Answering Paragraph 36, NEW YORK MARINE admits the allegation
15 therein that Travelers and NEW YORK MARINE "each owe the insured a defense in
16 the Underlying Action". However, NEW YORK MARINE denies that it has an
17 ongoing obligation to defend the insured in light of: (1) the insured's refusal of the
18 defense properly provided by NEW YORK MARINE through appointed defense
19 counsel; and/or (2) the refusal of independent counsel retained by the insured and
20 funded by Travelers to cooperate with or facilitate the participation of defense counsel
21 appointed by NEW YORK MARINE, and Travelers' unclean hands with respect to
22 that lack of cooperation including by way of its failure to require that independent
23 counsel which it approved and appointed cooperate with and facilitate the active
24 participation of NEW YORK MARINE's appointed counsel in the defense.

25 37. Answering Paragraph 37, NEW YORK MARINE has insufficient
26 information to admit or deny the allegations therein, and therefore denies the same.

27 38. Answering Paragraph 38, NEW YORK MARINE denies the allegations
28 therein.

1 39. Answering Paragraph 39, NEW YORK MARINE admits the allegations
2 therein.

3 40. Answering Paragraph 40, NEW YORK MARINE denies the allegations
4 that it “owes but [] has refused to reimburse Travelers or pay any fees of the mutual
5 insured’s independent defense counsel” inasmuch as it has previously paid to
6 Travelers the sum of \$621,693.43. New York Marine further denies that it
7 “committed to participate in the defense and split the fees and costs incurred by
8 independent counsel on and after November 20, 2020” inasmuch as any agreement
9 made by NEW YORK MARINE was made pursuant to an express reservation of its
10 rights; consequently, NEW YORK MARINE further denies the allegation on the
11 grounds that any obligation to defend or to reimburse Travelers for the costs of such
12 defense has been excused by both Travelers’ unclean hands and by the Insured’s
13 refusal of the defense provided by NEW YORK MARINE.

14 41. Answering Paragraph 41, NEW YORK MARINE submits that the
15 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
16 otherwise denies Travelers’ entitlement to the relief requested therein.

17 WHEREFORE, NEW YORK MARINE denies the allegations set forth and
18 dispute Travelers claim for relief as set forth in the First Amended Complaint’s prayer
19 for relief.

20 **AFFIRMATIVE DEFENSES**

21 **FIRST AFFIRMATIVE DEFENSE**

22 42. As a first, separate defense to all claims for relief alleged in the First
23 Amended Complaint, NEW YORK MARINE alleges as to each and every cause of
24 action and claim that Plaintiff’s Complaint fails to state facts sufficient to constitute
25 a claim upon which relief can be granted.

26 **SECOND AFFIRMATIVE DEFENSE**

27 43. As a second, separate defense, the First Amended Complaint and each
28 of its causes of action are barred because Plaintiff lacks standing to assert the claims

1 therein.

2 **THIRD AFFIRMATIVE DEFENSE**

3 44. As a third, separate defense, the First Amended Complaint and each of
4 its causes of action are barred because Plaintiff has failed to name and join all
5 necessary parties.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 45. As a fourth, separate defense to all claims for relief alleged in the First
8 Amended Complaint, NEW YORK MARINE alleges that it acted in accordance with
9 the terms of its policy and applicable law and that Plaintiff and/or its insured are not
10 entitled to benefits under the policy because the insured has failed to satisfy conditions
11 precedent to coverage, including by failing to cooperate with NEW YORK MARINE
12 and its appointed defense counsel.

13 **FIFTH AFFIRMATIVE DEFENSE**

14 46. As a fifth, separate defense, the First Amended Complaint and each of
15 its causes of action are barred because NEW YORK MARINE has reasonably
16 performed and discharged in good faith each and every obligation, if any, owed to the
17 insured and/or to Travelers.

18 **SIXTH AFFIRMATIVE DEFENSE**

19 47. As a sixth, separate defense, the First Amended Complaint and each of
20 its causes of action are barred because all of NEW YORK MARINE's actions with
21 respect to Plaintiff and the insured were done in good faith and/or in a manner
22 consistent with business necessity.

23 **SEVENTH AFFIRMATIVE DEFENSE**

24 48. As a seventh, separate defense, the First Amended Complaint and each
25 of its causes of action are barred, in whole or in part, because NEW YORK MARINE
26 did not, either directly, legally, or proximately cause and/or contribute to Plaintiff's
27 alleged damages, injuries, or losses.

28 ///

1 **EIGHTH AFFIRMATIVE DEFENSE**

2 49. As an eighth, separate defense, the First Amended Complaint and each
3 of its causes of action are barred, in whole or in part, by the doctrine of laches.

4 **NINTH AFFIRMATIVE DEFENSE**

5 50. As a ninth, separate defense, the First Amended Complaint and each of
6 its causes of action are barred, in whole or in part, by Travelers' "unclean hands."
7 Specifically, any failure by NEW YORK MARINE'S appointed defense counsel to
8 fully participate in the defense of the insured up to and including its withdrawal from
9 the defense on November 6, 2020 resulted from the conduct of independent counsel
10 appointed by the insured and funded by Travelers who affirmatively and deliberately
11 refused to cooperate with and actively sought to obstruct, prevent and limit the
12 participation of NEW YORK MARINE's appointed counsel (who was originally
13 retained by the insured) in the insured's defense, and moreover, that Travelers either
14 deliberately encouraged and fomented the conduct of independent counsel in
15 affirmatively and deliberately refusing to cooperate with New York Marine's
16 appointed counsel and actively sought to obstruct, prevent and limit their
17 participation, and/or failed to insist that independent counsel cooperate with and
18 facilitate the participation of NEW YORK MARINE's appointed defense counsel,
19 including by failing to either bring an action to enforce independent counsel's
20 obligation to cooperate with NEW YORK MARINE's appointed counsel as Travelers
21 was entitled to do pursuant to Civil Code § 2860(f), or in the alternative, to decline to
22 pay or delay payment of its invoices until its independent counsel did so.

23 NEW YORK MARINE further contends that Travelers has "unclean hands"
24 because it has inhibited and sought to obstruct NEW YORK MARINE'S ongoing
25 participation in the defense of the insured, including by failing to timely provide
26 copies of status reports, invoices, billing audits and proofs of payment, despite NEW
27 YORK MARINE's repeated requests to both Travelers and independent counsel for
28 such documents and information, including by failing to either request such status

1 reports or to insist upon their provision as required of independent counsel under Civil
2 Code §§ 2860(d) and (f), and/or by instructing and/or encouraging independent
3 counsel to not share all or certain of such invoices, status reports and other relevant
4 information with NEW YORK MARINE despite NEW YORK MARINE's repeated
5 requests.

6 Accordingly, and on account of the foregoing conduct, NEW YORK MARINE
7 contends that Travelers' claims and rights of recovery are barred in whole or in part.

8 **TENTH AFFIRMATIVE DEFENSE**

9 51. As a tenth, separate defense, the First Amended Complaint and each of
10 its causes of action are barred, in whole or in part, to the extent that Plaintiff has failed
11 to mitigate, minimize or avoid the harm for the claims alleged in this action, and any
12 recovery against Defendant must, therefore, be reduced by the amount of any such
13 costs and/or damages thereby incurred by Plaintiff.

14 **ELEVENTH AFFIRMATIVE DEFENSE**

15 52. As an eleventh, separate defense, the First Amended Complaint and each
16 of its causes of action are barred, in whole or in part, because any obligation of NEW
17 YORK MARINE to Plaintiff and/or the insured has been excused.

18 **TWELFTH AFFIRMATIVE DEFENSE**

19 53. As a twelfth, separate defense, NEW YORK MARINE is entitled to an
20 offset against any amount awarded to Plaintiff on account of the First Amended
21 Complaint and each of its causes of action for sums already incurred by NEW YORK
22 MARINE in the defense of the INSURED, and/or for sums already paid to Plaintiff.

23 **ADDITIONAL DEFENSES**

24 54. NEW YORK MARINE reserves the right to assert additional defenses
25 based on information learned or obtained during discovery.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, NEW YORK MARINE prays as follows:

28 1. That Plaintiff takes nothing by way of the First Amended Complaint on

1 file herein

2 2. That in the event the Court determines that it should declare the rights
3 and the duties of the parties as requested by Travelers' First Amended Complaint, that
4 the Court declare that:

5 a. NEW YORK MARINE has no duty to defend the mutual insured;

6 b. That NEW YORK MARINE has no obligation to provide the
7 insured with a defense with independent defense counsel of the insured's choosing;

8 c. That NEW YORK MARINE has satisfied its duty to defend the
9 insured in the UNDERLYING ACTION by appointing defense counsel to represent
10 the INSURED, and that NEW YORK MARINE has not breached its duty to defend
11 the insured by failing to provide it with an adequate defense, including by failing to
12 pay attorneys fees to do adequate work to defend the insured or by not replacing its
13 appointed retained attorneys at all when they withdrew from the defense;

14 d. That NEW YORK MARINE has no obligation to reimburse
15 Travelers for one half of the costs and expenses incurred by Travelers in the defense
16 of the insured or any other amount; and

17 e. That NEW YORK MARINE has no obligation to pay at least one
18 half of the fees, costs and expenses incurred by independent counsel appointed by
19 Travelers on a going-forward basis or any other amount.

20 3. That the Court not enjoin NEW YORK MARINE from refusing to
21 participate in the defense of the underlying action via independent counsel selected
22 by the insured nor order NEW YORK MARINE pay at least 50% of the attorneys
23 fees, costs and expenses incurred by independent counsel appointed by Travelers
24 going forward or any other amount.

25 4. That NEW YORK MARINE be awarded judgment in its favor on
26 Plaintiff's First Amended Complaint.

27 5. That NEW YORK MARINE be awarded its costs of suit; and

28 6. That NEW YORK MARINE be awarded such other and further relief as

1 the court deems just and proper.

2 Dated: March 25, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

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4
5 By: /s/ James P. Wagoner

James P. Wagoner

Lejf E. Knutson

Nicholas H. Rasmussen

Graham A. Van Leuven

Attorneys for Defendant New York Marine and
General Insurance Company

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11 **COUNTERCLAIM**

12 Defendant and Counterclaimant New York Marine and General Insurance
13 Company (“New York Marine”) brings this Counterclaim against Plaintiff and
14 Counter-Defendant Travelers Commercial Insurance Company (“Travelers”) and
15 alleges as follows:

16 **GENERAL ALLEGATIONS**

17 **The Travelers Insurance Policy**

18 1. Travelers issued homeowners policy no. 601627108 634 1 to the mutual
19 insured for the policy period November 14, 2018 to November 14, 2019 (the
20 “Travelers Policy”). The Travelers Policy was issued/delivered to the mutual insured
21 in California. The coverage provided by the Travelers Policy extends to otherwise
22 covered or potentially covered damages because of defamation. The Travelers policy
23 promised a defense to any lawsuit seeking such damages.

24 2. New York Marine issued a commercial general liability policy, policy
25 no. 201800012500, which provides coverage to the mutual insured for the policy
26 period July 18, 2018 to July 18, 2019 (the “New York Marine Policy”). The New
27 York Marine policy includes coverage for claims of “defamation” subject to its terms,
28

1 conditions and limitations.

2 **The Underlying Action**

3 3. In or about March 2019, the mutual insured was sued in Virginia state
4 court (“the Underlying Action”). The Underlying Action seeks damages for
5 defamation. The Underlying Action states claims which are potentially within the
6 scope of both the Travelers and New York Marine Policies subject to the terms,
7 provisions and limitations of the New York Marine policy.

8 **New York Marine’s Acceptance of the Insured’s Defense**

9 4. In or about September 4, 2019, the insured tendered the Underlying
10 Action to New York Marine.

11 5. Upon information and belief, the insured also tendered the Underlying
12 Action to Travelers on or about September 4, 2019.

13 6. On October 1, 2019, New York Marine accepted the insured’s defense
14 subject to a reservation of its rights.

15 7. New York Marine appointed the law firm Cameron McEvoy PLLC
16 (“Cameron McEvoy”), to defend the insured in the Underlying Action. At the time it
17 appointed Cameron McEvoy to represent the insured in the Underlying Action,
18 Cameron McEvoy was already representing the insured in that litigation, having been
19 previously retained by the insured.

20 8. Cameron McEvoy is located in Fairfax, Virginia, and the attorneys
21 retained to defend the insured in the Underlying Action are licensed in, *inter alia*,
22 Virginia but not in California.

23 9. In appointing Cameron McEvoy, New York Marine expressly instructed
24 that firm that it was to serve as “lead counsel” in the defense of the insured in the
25 Underlying Action.

26 **Travelers’ Acceptance of the Insured’s Defense**

27 10. By way of an October 7, 2019 reservation of rights letter, Travelers
28 agreed to assume the insured’s defense in the Underlying Action, subject to a

1 reservation of Travelers' rights as set forth therein.

2 11. Travelers' October 7, 2019 reservation of rights letter offered to provide
3 the insured with independent counsel.

4 12. Following Travelers' October 7, 2019 reservation of rights letter, the
5 insured retained and Travelers has funded the insured's defense through New York
6 based attorney Roberta Kaplan of the law firm Kaplan Hecker & Fink LLP
7 ("Kaplan").

8 13. In or about June 2020, the insured replaced the Kaplan firm with
9 Virginia-based and licensed attorney Elaine Bredehoft of the law firm Charlson
10 Bredehoft Cohen Brown & Nadelhaft, P.C ("Charlson Bredehoft").

11 14. Although Travelers has permitted the insured and both the Kaplan and
12 Charlson Bredehoft firms to retain and utilize other attorneys and firms to assist in the
13 representation of the insured, the Kaplan firm and, subsequently, the Charlson
14 Bredehoft firm, were the only firms funded by Travelers who were primarily
15 responsible for the insured's defense.

16 15. Further, although Civil Code § 2860(c) states that "[t]he insurer's
17 obligation to pay fees to the independent counsel selected by the insured is limited to
18 the rates which are actually paid by the insurer to attorneys retained by it in the
19 ordinary course of business in the defense of similar actions in the community where
20 the claim arose or is being defended", Travelers did not enforce this requirement on
21 independent counsel retained by the insured and funded by Travelers. Instead,
22 Travelers permitted the independent counsel retained by the insured and funded by
23 Travelers to bill and receive payment at independent counsel's own usual and
24 customary rates—rates which are higher than "the rates which are actually paid by"
25 Travelers "to attorneys retained by it in the ordinary course of business in the defense
26 of similar actions in the community where the claim arose or is being defended".

27 16. Specifically, in or about June 10, 2020, Travelers entered into an
28 agreement with independent counsel pursuant to which independent counsel was

1 permitted to bill its usual and customary hourly rates, without limitation on those
2 amounts, subject to a purported agreement that this would constitute a “capped fee of
3 \$2,500,000.00 through post-trial motions”.

4 17. As of February 2021, independent counsel had exhausted the purported
5 fee cap of “\$2,500,000”, but trial remained more than a year away. Rather than
6 holding independent counsel to the June 2020 agreement, on May 18, 2021 Travelers
7 entered into a new agreement with independent counsel pursuant to which it vitiated
8 the original purported “capped fee” and agreed to continue to pay independent
9 counsel’s ongoing fees and costs. On information and belief, by way of the new May
10 18, 2021 agreement, Travelers exercised its right under Civil Code § 2860 to limit
11 payments to independent counsel to “the rates which are actually paid by” it “to
12 attorneys retained by it in the ordinary course of business in the defense of similar
13 actions in the community where the claim arose or is being defended”, and then only
14 on a going-forward basis.

15 18. As a result, on information and belief, Travelers has incurred in excess
16 of \$5,000,000 in defense fees and costs in connection with the underlying action, far
17 in excess of the amounts which Travelers was required to pay in light of the provisions
18 of Civil Code § 2860(c) upon which it could have relied.

19 **The Conduct of the Underlying Defense**

20 19. Following Travelers’ and New York Marine’s respective reservations of
21 rights, Travelers and New York Marine, through the respective counsel funded by
22 each, proceeded to defend the insured in the Underlying Action.

23 20. However, independent counsel retained by the insured and funded by
24 Travelers consistently refused to cooperate with Cameron McEvoy and deliberately
25 obstructed and prevented Cameron McEvoy’s active involvement in the defense of
26 the insured. Specifically, independent counsel retained by the insured and funded by
27 Travelers frequently omitted Cameron McEvoy and its attorneys from
28 communications with the Court and opposing counsel, and from case-related emails.

1 Independent counsel retained by the insured and funded by Travelers also frequently
2 omitted and failed to notify or include Cameron McEvoy in discussions and
3 consideration of case strategy and tactics, and frequently failed to include Cameron
4 McEvoy in pleadings and notices, including by removing them from the pleadings,
5 proofs of service, and other notices.

6 21. In or about August 2020, the Charlson Bredehoft firm entered into a
7 stipulation to continue trial without: (1) including Cameron McEvoy in discussions
8 surrounding the stipulation; (2) notifying Cameron McEvoy that such a stipulation
9 was contemplated; or (3) including Cameron McEvoy on the stipulation or related
10 proofs of service; with the result that Cameron McEvoy learned of the stipulation and
11 the Court's resulting Order through the Court's publicly available docket.

12 22. Travelers has inhibited and obstructed New York Marine's ongoing
13 participation in the defense of the insured by failing to timely provide copies of status
14 reports, invoices, billing audits and proofs of payment, despite New York Marine's
15 requests to Travelers and independent counsel for such documents and information,
16 including by failing to either request that independent counsel provide such status
17 reports, by failing to insist upon their provision as required of independent counsel
18 under Civil Code §§ 2860(d) and (f), and/or by instructing and/or encouraging
19 independent counsel to not share all or certain of such invoices, status reports, and
20 relevant information with New York Marine despite New York Marine's requests.

21 23. Travelers was aware that the independent counsel which it was funding
22 refused to cooperate with or facilitate the Cameron McEvoy firm's participation in
23 the defense.

24 24. Indeed, in a March 21, 2020 email to attorney Sean Roche of Cameron
25 McEvoy, Pamela Johnson, Travelers' Assistant Vice President, Claim Professional,
26 Intellectual Property, Business Torts, who was responsible for handling the
27 Underlying Action on behalf of Travelers, expressly acknowledged that she had
28 spoken to independent counsel "about billing, sharing the work, etc." and stated that

1 her conversation with independent counsel “did not go well”.

2 25. Notwithstanding Travelers’ March 2020 conversation with them,
3 independent counsel continued to refuse to cooperate with or facilitate Cameron
4 McEvoy’s active participation in the defense of the Underlying Action.

5 26. Travelers thereafter both failed to insist that independent counsel
6 cooperate with and facilitate the full and active participation of the Cameron McEvoy
7 firm in the defense of the insured in the Underlying Action and to enforce independent
8 counsel’s cooperation with Cameron McEvoy as it was authorized to do under Civil
9 Code § 2860(f).

10 27. As a result of independent counsel’s refusal to cooperate with or
11 facilitate its active participation in the defense of the Underlying Action and
12 Travelers’ failure to obtain or require its cooperation, on November 6, 2020, the
13 Cameron McEvoy firm withdrew from its representation of the insured in that action.

14 **FIRST CAUSE OF ACTION – DECLARATORY RELIEF – NEW YORK**

15 **MARINE DID NOT OWE A DUTY TO DEFEND THE INSURED**

16 **THROUGH INDEPENDENT COUNSEL**

17 **(Against Travelers)**

18 28. New York Marine hereby incorporates by reference paragraphs 1-27 of
19 this Counterclaim as though fully set forth and alleged herein.

20 29. Under California law, a “general” reservation of an insurer’s rights does
21 not trigger an insured’s right to independent counsel.

22 30. Under Virginia law, insurer-appointed defense counsel only has the
23 insured for a client.

24 31. Virginia does not apply any legal presumption that defense counsel
25 retained an insurer to defend an insured under a reservation of rights will do anything
26 in the conduct of the insured’s defense which is inconsistent with the insured’s
27 interests.

28 32. New York Marine’s October 1, 2019 reservation of rights did not trigger

1 any right in the insured to independent counsel since, as the Court concluded in its
2 January 6, 2022 Order, the reservation of rights issued by New York Marine is a
3 “general” reservation of rights which “is not sufficient to create a duty on the insurer
4 to provide independent counsel”.

5 33. Additionally, because the Underlying Action is litigated in Virginia state
6 court and the Cameron McEvoy firm and the attorneys appointed by New York
7 Marine to defend the insured in the Underlying Action are licensed in Virginia but
8 not in California, no conflict existed between the insured, defense counsel, and New
9 York Marine, and consequently New York Marine’s reservation of rights did not
10 trigger a right in the insured to independent counsel under Civil Code § 2860 because
11 no conflict existed between them under Virginia law.

12 34. Accordingly, New York Marine did not owe a duty to defend the insured
13 through independent counsel because: (1) its reservation of rights did not trigger the
14 right to independent counsel as a matter of California law since, as the Court
15 concluded in its January 6, 2022 Order, the reservation of rights issued by New York
16 Marine is a “general” reservation of rights which “is not sufficient to create a duty on
17 the insurer to provide independent counsel”; and (2) because under Virginia law, the
18 Virginia-licensed attorneys of the Cameron McEvoy firm which New York Marine
19 appointed to defend the insured could have no conflict, no obligation to defend the
20 insured through independent counsel was triggered under California law, whether
21 pursuant to Civil Code § 2860 or any other provision of California law.

22 35. Because New York Marine’s October 1, 2019 reservation of rights did
23 not obligate it to provide the insured with independent counsel in connection with the
24 Underlying Action, New York Marine, by providing a defense in the Underlying
25 Action through appointed counsel the Cameron McEvoy firm, did not fail to defend
26 the insured.

27 36. New York Marine is informed and believes based on the allegations of
28 Travelers’ First Amended Complaint herein, as well as the discussions,

1 correspondence, and documents exchanged between New York Marine and Travelers,
2 that Travelers disputes each of the foregoing contentions, and that accordingly, an
3 actual, justiciable controversy exists between New York Marine and Travelers as to
4 these matters.

5 37. Wherefore, New York Marine is entitled to a declaration that it owed no
6 duty to defend the insured in the Underlying Action through independent counsel both
7 because: (1) its reservation of rights did not trigger the insured's right to independent
8 counsel as a matter of California law since, as the Court concluded in its January 6,
9 2022 Order, the reservation of rights issued by New York Marine is a "general"
10 reservation of rights which "is not sufficient to create a duty on the insurer to provide
11 independent counsel"; and (2) because under Virginia law the Virginia-licensed
12 attorneys of the Cameron McEvoy firm which New York Marine appointed to defend
13 the insured could have no conflict of interest in representing the insured upon their
14 appointment by New York Marine, New York Marine had no obligation to defend the
15 insured through independent counsel under California law, whether pursuant to Civil
16 Code § 2860, or any other provision of California law.

17 **SECOND CAUSE OF ACTION – DECLARATORY RELIEF – NEW YORK**
18 **MARINE DID NOT FAIL TO PROVIDE A DEFENSE TO ITS INSURED**
19 **(Against Travelers)**

20 38. New York Marine hereby incorporates by reference paragraphs 1-37 of
21 this Counterclaim as though fully set forth and alleged herein.

22 39. New York Marine's October 1, 2019 reservation of rights did not give
23 rise to any obligation to provide the insured with independent counsel in connection
24 with the defense of the Underlying Action.

25 40. Because New York Marine's October 1, 2019 reservation of rights did
26 not give rise to any obligation to provide the insured with independent counsel in
27 connection with the defense of the Underlying Action, New York Marine did not
28 breach any obligation to the insured or to Travelers by providing a defense to the

1 insured through appointed counsel, the Cameron McEvoy firm who was originally
2 obtained by the insured.

3 41. New York Marine is informed and believes based on the allegations of
4 Travelers' First Amended Complaint herein, as well as the discussions,
5 correspondence and documents exchanged between New York Marine and Travelers,
6 that Travelers disputes each of the foregoing contentions, and that accordingly, an
7 actual, justiciable controversy exists between New York Marine and Travelers as to
8 these matters.

9 42. Wherefore, New York Marine is entitled to a declaration that it did not
10 breach any duty to the insured or to Travelers by defending the insured through
11 appointed counsel, the Cameron McEvoy firm who was originally retained by the
12 insured.

13 **THIRD CAUSE OF ACTION – DECLARATORY RELIEF –**

14 **REIMBURSEMENT**

15 **(Against Travelers)**

16 43. New York Marine hereby incorporates by reference paragraphs 1-42 of
17 this Counterclaim as though fully set forth and alleged herein.

18 44. From the outset of New York Marine's participation in the defense of
19 the insured, Travelers has wrongfully contended that New York Marine owed a duty
20 to defend the insured through independent counsel, and in particular, that New York
21 Marine reimburse Travelers for 50% of the fees and costs it incurred in funding
22 independent counsel retained by the insured, and thereafter participate with it in
23 funding independent counsel on a 50/50 basis going forward.

24 45. In agreeing to defend the insured through independent counsel, Travelers
25 failed or refused to exercise its right to limit amounts paid to independent counsel to
26 "the rates which are actually paid by" Travelers "to attorneys retained by it in the
27 ordinary course of business in the defense of similar actions in the community where
28 the claim arose or is being defended", instead entering into improvident agreements

1 with independent counsel pursuant to which independent counsel was permitted to
2 charge, and Travelers paid, higher rates and fees than the rates and fees which
3 Travelers could have limited counsel to under Civil Code § 2860(c), and then
4 ultimately failed even to enforce what limitations on independent counsel's fees were
5 contained in its agreements with independent counsel.

6 46. Travelers was aware that independent counsel consistently refused to
7 cooperate with or facilitate the participation of New York Marine's appointed
8 counsel, the Cameron McEvoy firm, in the defense of the insured, but whether
9 through its negligence, indifference, or as part of a deliberate scheme to obtain New
10 York Marine's participation with it in its ill-conceived and improvident agreements
11 with independent counsel, Travelers failed to insist upon and obtain independent
12 counsel's agreement to cooperate with and facilitate the full and active participation
13 of the Cameron McEvoy firm in the defense of the insured, including by withholding
14 payment of some or all of independent counsel's fees, by bringing an action for
15 declaratory relief against independent counsel, or by seeking an injunction against
16 independent counsel as it was permitted to do under Civil Code § 2860(f) to enforce
17 independent counsel's obligation to cooperate with Cameron McEvoy and facilitate
18 its participation in the defense of the insured.

19 47. As a result of the inequitable conduct of Travelers, the Cameron McEvoy
20 firm withdrew from the insured's defense in the Underlying Action on November 6,
21 2020.

22 48. Following the November 6, 2020 withdrawal of the Cameron McEvoy
23 firm from the insured's defense in the Underlying Action, New York Marine, subject
24 to a reservation of rights, has to date paid Travelers at least the sum of \$621,693.43,
25 reflecting 50% of the fees and costs incurred by independent counsel from November
26 6, 2020 through February 28, 2021.

27 49. Nevertheless, despite numerous and repeated requests from New York
28 Marine, neither Travelers nor independent counsel has provided New York Marine

1 with copies of all status reports, invoices, billing audits, and related materials
2 reflecting all amounts incurred by independent counsel and/or paid by Travelers to
3 independent counsel since November 6, 2020, nor has New York Marine received
4 status updates or other documents reflecting all the work performed by independent
5 counsel since that date.

6 50. Travelers' conduct in entering into improvident agreements with
7 independent counsel under which Travelers agreed to pay independent counsel
8 amounts in excess of the amounts Travelers was obligated to pay under Civil Code §
9 2860(c), in failing to enforce limitations in its agreements with independent counsel,
10 in failing to require that independent counsel—whether voluntarily or otherwise—
11 cooperate with and facilitate the Cameron McEvoy firm's full and active participation
12 in the defense of the Underlying Action, and in failing provide New York Marine with
13 copies of all relevant reports, invoices, and other documents reflecting the work
14 performed and the fees and costs incurred by independent counsel, amounts to
15 "unclean hands" which should bar, in whole or in part, any right of Travelers to
16 recover amounts from New York Marine, including for fees and costs incurred by
17 Travelers to defend the insured after the November 6, 2020 withdrawal of the
18 Cameron McEvoy firm from the insured's defense, including sums for which New
19 York Marine, under reservation of rights, has reimbursed Travelers.

20 51. Under California law, where an insurer properly offers a defense through
21 appointed counsel, and the insured refuses the defense, neither the insured nor other
22 insurers which fund the insured's defense may recover from the non-participating
23 insurer for sums incurred to defend and/or indemnify the insured.

24 52. The refusal of independent counsel to cooperate with or facilitate the
25 active participation of Cameron McEvoy in the defense of the Underlying Action and
26 Travelers' failure to obtain or enforce independent counsel's cooperation with
27 Cameron McEvoy, which resulted in Cameron McEvoy's withdrawal from the
28 defense, amounts to a "refusal" by the insured and/or Travelers of the defense

1 rightfully extended by New York Marine and unclean hands by Travelers.

2 53. Because of the insured's and Travelers' "refusal" of the defense offered
3 by New York Marine and Travelers' unclean hands, Travelers is not entitled to any
4 recovery for amounts incurred by it in the defense of the Underlying Action.

5 54. As such, New York Marine is entitled to recover the sum of \$621,693.43
6 previously paid to Travelers on or about January 18, 2022 under reservation of rights,
7 in reimbursement of 50% of the defense fees incurred by independent counsel and
8 paid by Travelers for the period from Cameron McEvoy's withdrawal on November
9 6, 2020 through February 28, 2021, under reservation of New York Marine's rights,
10 as well as interest on that amount from January 18, 2022.

11 55. New York Marine is also entitled to recover any additional amounts
12 which it may pay to Travelers on account of defense fees incurred following the
13 withdrawal of the Cameron McEvoy firm, as well as interest on those amounts from
14 the date of payment by New York Marine.

15 56. New York Marine is informed and believes, based on the allegations of
16 Travelers' First Amended Complaint herein as well as the discussions,
17 correspondence, and documents exchanged between New York Marine and Travelers,
18 that Travelers disputes each of the foregoing contentions, and that accordingly, an
19 actual, justiciable controversy exists between New York Marine and Travelers as to
20 these matters.

21 57. Wherefore, New York Marine is entitled to a declaration that: (1) New
22 York Marine is entitled to reimbursement of the \$621,693.43 previously paid to
23 Travelers on or about January 18, 2022 under reservations, plus interest from that
24 date; (2) that New York Marine is entitled to reimbursement of any additional
25 amounts paid to Travelers in reimbursement of defense fees and costs incurred after
26 the November 6, 2020 withdrawal of Cameron McEvoy, plus interest from the date
27 of such payment(s) by New York Marine; and (3) that Travelers is not entitled to
28 recover any additional sums from New York Marine for costs incurred by independent

1 counsel in the defense of the underlying action after November 6, 2022.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, NEW YORK MARINE prays as follows:

4 1. That it be awarded judgment in its favor on all of the causes of action set
5 forth herein including for an award of damages in the amount of \$621,693.43 plus
6 interest from January 18, 2022;

7 2. For a declaration that it did not owe any duty to provide the insured with
8 independent counsel;

9 3. For a declaration that it did not breach any duty to the insured or to
10 Travelers by defending the insured through appointed counsel originally selected by
11 the insured;

12 4. For a declaration that in entering into improvident agreements with
13 independent counsel under which Travelers agreed to pay independent counsel
14 amounts in excess of the amounts Travelers was obligated to pay under Civil Code §
15 2860(c), in failing to enforce limitations in its agreements with independent counsel,
16 and in failing to obtain or enforce independent counsel's cooperation with Cameron
17 McEvoy and facilitate its full and active participation in the defense of the Underlying
18 Action, as Travelers was entitled to do under Civil Code § 2860(f), and in failing to
19 provide New York Marine with copies of all relevant reports, invoices, and other
20 documents reflecting the work performed and fees and costs incurred by independent
21 counsel, that Travelers engaged in inequitable conduct and has "unclean hands" which
22 completely bar, in whole or in part, any claim which Travelers has for recovery of
23 defense fees which it incurred following the November 6, 2020 withdrawal of the
24 Cameron McEvoy firm from the insured's defense in the Underlying Action;

25 5. For a declaration that: (1) that New York Marine is entitled to
26 reimbursement of any additional amounts paid to Travelers in reimbursement of
27 defense fees and costs incurred after the November 6, 2020 withdrawal of Cameron
28 McEvoy, plus interest from the date of such payment(s) by New York Marine; and

(2) Travelers is not entitled to recover any additional sums from New York Marine for costs incurred by independent counsel in the defense of the underlying action after November 6, 2022;

6. That it be awarded its costs of suit;

7. For interest;

8. For such other and further relief as the Court deems just and proper.

Dated: March 25, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By: /s/ James P. Wagoner

James P. Wagoner

Lejf E. Knutson

Nicholas H. Rasmussen

Graham A. Van Leuven

Attorneys for Defendant New York Marine and
General Insurance Company

JURY DEMAND

Defendant and Counterclaimant NEW YORK MARINE hereby demands a jury trial to the fullest extent facilitated by law.

Dated: March 25, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By: /s/ James P. Wagoner

James P. Wagoner

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Attorneys for Defendant New York Marine and
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8239080.1

PROOF OF SERVICE

Travelers Commercial Insurance Company v. New York Marine and General Insurance Company

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On March 25, 2022, I served true copies of the following document(s) described as **DEFENDANT NEW YORK MARINE AND GENERAL INSURANCE COMPANY'S ANSWER TO FIRST AMENDED COMPLAINT, COUNTERCLAIM, AND DEMAND FOR JURY TRIAL** on the interested parties in this action as follows:

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*Attorneys for Plaintiff Travelers
Commercial Insurance Company*

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 25, 2022, at Fresno, California.

/s/ Marisela Taylor
Marisela Taylor

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8 Attorneys for Plaintiff New York Marine
and General Insurance Company

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
11

12 NEW YORK MARINE AND
GENERAL INSURANCE COMPANY,
13 a New York corporation,

14 Plaintiff,

15 v.

16 AMBER HEARD, an individual,

17 Defendant.
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Case No. 2:22-cv-04685

FIRST AMENDED COMPLAINT

1 Plaintiff New York Marine and General Insurance Company (“New York
2 Marine”) alleges as follows:

3 **JURISDICTION AND VENUE**

4 1. The United States District Court for the Central District of California has
5 original jurisdiction over this case under 28 U.S.C. § 1332 because the amount in
6 controversy exceeds the sum of \$75,000.00 and this matter involves citizens of
7 different states. This Court is authorized to grant declaratory judgment under the
8 Declaratory Judgment Act, 28 U.S.C. § 2201, pursuant to Rule 57 of the Federal Rules
9 of Civil Procedure.

10 2. In this action, New York Marine seeks a judicial determination of the
11 respective rights of the parties under an insurance policy issued to Under the Black
12 Sky, Inc., which included Amber Heard (“Heard”) as a Named Insured, with respect
13 to Heard’s defense and indemnity in an underlying lawsuit.

14 3. Plaintiff’s claims for declaratory relief are authorized by 28 U.S.C.
15 §§ 2201.

16 4. Venue is proper under 28 U.S.C. § 1391(b)(1) because Heard resides in
17 the Central District of California.

18 5. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part
19 of the events giving rise to this action occurred in this judicial district, consisting of
20 the issuance of the insurance policy to Under the Black Sky, Inc. with a relevant
21 mailing address in the Central District of California.

22 **THE PARTIES**

23 6. Plaintiff New York Marine is a corporation organized under the laws of
24 the State of New York, with a principle place of business in New York City within
25 the State of New York.

26 7. Heard is and at all times herein mentioned was an individual who is a
27 citizen and resident of California.

28 ///

1 **FACTUAL ALLEGATIONS**

2 **The Insurance Policy**

3 8. New York Marine issued insurance policy no. GL201800012500 to
4 named insureds Under the Black Sky, Inc. and Amber Heard for the policy period
5 July 18, 2018 to July 18, 2019, with a per occurrence limit of liability of \$1,000,000
6 (hereinafter the “Policy”). A true and correct copy of the Policy with premium and
7 address information redacted is attached hereto as Exhibit “A.”

8 9. The Policy includes a Comprehensive Personal Liability Coverage part
9 which provides coverage for “damages because of ‘bodily injury’, ‘property damage’
10 or ‘personal injury’ caused by an ‘occurrence’” to which the coverage applies.
11 (Exhibit A at p. 53 of 57.)

12 10. The Policy defines “personal injury” to mean “injury other than ‘bodily
13 injury’, arising out of one or more” enumerated offenses included in the policy, which
14 includes “oral or written publication of material that slanders or libels a person or
15 organization including other forms of defamation” and “oral or written publication of
16 material including other forms of defamation that violates a person’s right of privacy.”
17 (Exhibit A at p. 56 of 57.)

18 **The Underlying Lawsuit**

19 11. On March 1, 2019, John C. Depp II (“Depp”) filed a lawsuit against
20 Heard in the Circuit Court of Fairfax County, Virginia, case no. CL-2019-0002911
21 (the “Underlying Action”).

22 12. In the Underlying Action, Depp sought and is seeking damages for
23 defamation based on an Op-Ed allegedly written by Heard and published in both the
24 online edition of *The Washington Post* on December 18, 2018 and in a print edition
25 of *The Washington Post* on December 19, 2018, and which was republished by Heard
26 in a tweet on December 19, 2018. A true and correct copy of the Complaint filed by
27 Depp in the Underlying Action is attached hereto as Exhibit “B.”

28 13. On or about September 4, 2019, Heard tendered the Underlying Action

1 to New York Marine.

2 14. On October 1, 2019, New York Marine accepted Heard's defense of the
3 Underlying Action subject to reservation of rights. Specifically, New York Marine
4 advised Heard that New York Marine would provide a legal defense but that "to the
5 extent California law does not permit an insurer to indemnify the insured, no
6 indemnity can be provided."

7 15. At the time Heard tendered the Underlying Action, the law firm Cameron
8 McEvoy PLLC was defending Heard in the Underlying Action. When New York
9 Marine accepted Heard's defense, New York Marine agreed to continue the defense
10 of Heard through the law firm Cameron McEvoy PLLC.

11 16. New York Marine is informed and believes, and on such information and
12 belief alleges, that Heard or her agents instructed other firms defending Heard in the
13 Underlying Action to not include Cameron McEvoy in Heard's ongoing defense. As
14 a result, on or around November 2, 2020, Cameron McEvoy withdrew from the
15 defense of Heard in the Underlying Action.

16 17. The Underlying Action proceeded to trial beginning on April 11, 2022.

17 18. On May 27, 2022, the Court in the Underlying Action issued Jury
18 Instructions to the jury. A true and correct copy of the Jury Instructions are attached
19 hereto as Exhibit "C."

20 19. In the Jury Instructions, the Court in the Underlying Action instructed
21 the jury that with respect to liability issues for Depp's claims against Heard, the jury's
22 verdict "must be based on the facts as you find them, and on the law contained in all
23 of these instructions." (Exhibit C at 4 of 38.)

24 20. The Jury Instructions also instructed the jury that with respect to liability
25 issues for Depp's claims against Heard, the issues for the jury to decide were:

26 (1) Whether Ms. Heard made or published any of the following
27 statements:

28 a. "Amber Heard: spoke up against sexual violence — and

1 faced our culture's wrath. That has to change.”

2 b. “Then two years ago, I became a public figure representing
3 domestic abuse, and I felt the full force of our culture’s
4 wrath for women who speak out.”

5 c. “I had the rare vantage point of seeing, in real time, how
6 institutions protect men accused of abuse.”

7 (Exhibit C at 4 of 38.)

8 21. As a “Finding Instruction” the Court in the Underlying Action instructed
9 the jury that it “shall only return your verdict for Mr. Depp on his claim for
10 defamation” if Depp had proved by the greater weight of evidence that:

11 (1) Ms. Heard made or published the following statement: “Then two
12 years ago, I became a public figure representing domestic abuse,
13 and I felt the full force of our culture's wrath for women who speak
14 out”; and

15 (2) The statement was about Mr. Depp; and

16 (3) The statement is false; and

17 (4) The statement has a defamatory implication about Mr. Depp; and

18 (5) The defamatory implication was designed and intended by Ms.
19 Heard; and

20 (6) Due to the circumstances surrounding the publication of this
21 statement, it conveyed a defamatory implication to someone who
22 saw it other than Mr. Depp; and

23 if Mr. Depp further proved by clear and convincing evidence:

24 (7) that Ms. Heard made the statement with actual malice.

25 If Mr. Depp failed to prove any one or more of the seven elements above,
26 then you shall find your verdict for Ms. Heard with respect to the above
27 statement.

28 (Exhibit C at 6 of 38.)

1 22. The Court in the Underlying Action issued a nearly identical “Finding
2 Instruction” for each of the other two statements identified in paragraph 20 above,
3 which only changed the content of the first element to replace the statement at issue.
4 (Exhibit C at 7-8 of 38.)

5 23. On June 1, 2022, the jury in the Underlying Action returned a verdict in
6 favor of Depp for counts of defamation based on all three statements. This verdict was
7 incorporated into a Judgment Order which was entered by the Court in the Underlying
8 Action on June 24, 2022. A true and correct copy of the Judgment Order is attached
9 hereto as Exhibit “D.”

10 24. As detailed in the Special Verdict Form, with regard to each of the three
11 statements at issue, the Jury found that Depp had “proven all the elements of
12 defamation” and answered in the affirmative to all of the following questions:

13 The statement was made or published by Ms. Heard?

14 The statement was about Mr. Depp?

15 The statement was false?

16 The statement had a defamatory implication about Mr. Depp?

17 The defamatory implication was designed and intended by Ms. Heard?

18 Due to circumstances surrounding the publication of the statement, it
19 conveyed a defamatory implication to someone who saw it other than
20 Mr. Depp?

21 (Exhibit D at 6-8 of 13.)

22 25. After answering all of those questions “yes”, the jury also answered
23 “yes” to the question “do you find that Mr. Depp has proven by clear and convincing
24 evidence that Ms. Heard acted with actual malice?” (Exhibit D. at 6-8 of 13.)

25 26. The jury awarded Depp \$10,000,000 in compensatory damages and
26 \$5,000,000 in punitive damages from Heard. However, the punitive damages were
27 reduced to a “statutory cap” of \$350,000 pursuant to Virginia Code § 8.01-38.1.
28 (Exhibit D at 1 of 13.)

FIRST CAUSE OF ACTION**(Declaratory Relief As To Plaintiff's Duty To Indemnify Heard For The Judgment Order Under The Policy)**

27. Plaintiff incorporates by reference all of the allegations of paragraphs 1 through 26 as though fully set forth herein.

28. California Insurance Code § 533 provides that "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." This provision is an implied exclusionary clause which, by statute, is read into all insurance policies under California law.

29. The jury's factual findings establish that Heard's liability is caused by the willful act(s) of Heard. As a result, as a matter of California public policy and pursuant to California Insurance Code § 533, the Policy does not provide coverage for Heard's liability as reflected in the Judgment Order entered on June 24, 2022.

30. An actual controversy has arisen and now exists between Plaintiff, on the one hand, and Heard, on the other hand, with regard to the duties and obligations owed between Plaintiff and Heard under the Policy with respect to the Judgment Order. Plaintiff contends that it has no duty to indemnify Heard for the Judgment Order entered on June 24, 2022. Plaintiff is informed and believes, and on such information and belief alleges, that Heard disputes Plaintiff's contention and asserts that the Policy provides indemnity coverage for Heard for the Judgment Order entered on June 24, 2022.

31. Due to the actual and present controversy described above, pursuant to 28 U.S.C. § 2201, Plaintiff requests a judicial declaration of the rights, duties and obligations under the Policy determining that if said Judgment Order entered on June 24, 2022 becomes final on appeal or otherwise, Plaintiff has no obligation to indemnify Heard for the Judgment Order.

///

SECOND CAUSE OF ACTION

**(Declaratory Relief As To Plaintiff's Duty To Indemnify Heard For Any
Judgment In The Underlying Action)**

32. Plaintiff incorporates by reference all of the allegations of paragraphs 1 through 31 as though fully set forth herein.

33. California Insurance Code § 533 provides that "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." This provision is an implied exclusionary clause which, by statute, is read into all insurance policies under California law.

34. As a matter of California public policy and pursuant to California Insurance Code § 533, the Policy does not provide coverage for Heard's liability to Depp.

35. An actual controversy has arisen and now exists between Plaintiff, on the one hand, and Heard, on the other hand, with regard to the duties and obligations owed between Plaintiff and Heard under the Policy with respect to indemnity for the Underlying Action. Plaintiff contends that it has no duty to indemnify Heard for the Underlying Action. Plaintiff is informed and believes, and on such information and belief alleges, that Heard disputes Plaintiff's contention and asserts that the Policy provides indemnity coverage for her for any liability which may be established in the Underlying Action.

36. Due to the actual and present controversy described above, pursuant to 28 U.S.C. § 2201, Plaintiff requests a judicial declaration of the rights, duties and obligations under the Policy determining that Plaintiff has no obligation to indemnify Heard for any liability regarding the Underlying Action.

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1 **THIRD CAUSE OF ACTION**

2 **(Declaratory Relief As To Plaintiff's Duty To Defend Heard In The Underlying**
 3 **Action The Policy [California Insurance Code § 533])**

4 37. Plaintiff incorporates by reference all of the allegations of paragraphs 1
 5 through 36 as though fully set forth herein.

6 38. Because the jury's factual findings regarding Heard's liability to Depp
 7 required a finding of willful act(s) by Heard to establish liability, California public
 8 policy and California Insurance Code § 533 preclude New York Marine from having
 9 any obligation to defend Heard in the Underlying Action.

10 39. An actual controversy has arisen and now exists between Plaintiff, on
 11 the one hand, and Heard, on the other hand, with regard to the duties and obligations
 12 owed between Plaintiff and Heard under the Policy with respect to whether New York
 13 Marine is obligated to defend Heard in the Underlying Action. Plaintiff contends that
 14 it has no duty to defend Heard based on California Insurance Code § 533. Plaintiff is
 15 informed and believes, and on such information and belief alleges, that Heard disputes
 16 Plaintiff's contentions and asserts that the Policy obligates New York Marine to
 17 continue to defend Heard on an ongoing basis in the Underlying Action.

18 40. Due to the actual and present controversy described above, pursuant to
 19 28 U.S.C. § 2201, Plaintiff requests a judicial declaration of the rights, duties and
 20 obligations under the Policy determining that with respect to defense of Heard,
 21 Plaintiff has no obligation on an ongoing basis for the Underlying Action.

22 **FOURTH CAUSE OF ACTION**

23 **(Declaratory Relief As To Plaintiff's Duty To Defend And Indemnify Heard In**
 24 **The Underlying Action Under The Policy [Conditions])**

25 41. Plaintiff incorporates by reference all of the allegations of paragraphs 1
 26 through 40 as though fully set forth herein.

27 42. The Comprehensive Personal Liability Coverage part of the Policy
 28 provides under "CONDITIONS ... Duties after Loss" that Heard must help New York

1 Marine by seeing that enumerated duties are performed, including helping New York
 2 Marine “with the conduct of suits and attend hearings and trials.” (Exhibit A at 56-58
 3 of 67.)

4 43. New York Marine is informed and believes, and on such information and
 5 belief alleges, that after New York Marine accepted Heard’s defense, Heard, both
 6 individually and through her agents, refused to help New York Marine with the
 7 conduct of the suit and instructed other defense firms representing Heard not to
 8 include defense counsel provided by New York Marine in the ongoing defense of
 9 Heard in the Underlying Action.

10 44. An actual controversy has arisen and now exists between Plaintiff, on
 11 the one hand, and Heard, on the other hand, with regard to the duties and obligations
 12 owed between Plaintiff and Heard under the Policy with respect to whether New York
 13 Marine is obligated to defend and/or indemnify Heard in the Underlying Action.
 14 Plaintiff contends that it has no duty to defend and/or indemnify Heard based on her
 15 failure to comply with the conditions of the Policy. Plaintiff is informed and believes,
 16 and on such information and belief alleges, that Heard disputes Plaintiff’s contentions
 17 and asserts that the Policy obligates New York Marine to continue to defend Heard
 18 on an ongoing basis in the Underlying Action and to indemnify her.

19 45. Due to the actual and present controversy described above, pursuant to
 20 28 U.S.C. § 2201, Plaintiff requests a judicial declaration of the rights, duties and
 21 obligations under the Policy determining that Plaintiff has no obligation to defend
 22 Heard on an ongoing basis in the Underlying Action or to indemnify her.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff respectfully requests that this Court

25 1) Enter a judgment declaring that:

26 a. Plaintiff has no duty to indemnify Heard for the Judgment Order
 27 entered on June 24, 2022 in the Circuit Court of Fairfax County, Virginia, case
 28 no. CL-2019-0002911 if said Judgment Order becomes final on appeal or

1 otherwise;

2 b. Plaintiff has no duty to indemnify Heard for any liability in the
3 Circuit Court of Fairfax County, Virginia, case no. CL-2019-0002911;

4 c. Plaintiff has no duty to defend Heard on an ongoing basis in the
5 Underlying Action, Circuit Court of Fairfax County, Virginia, case no. CL-
6 2019-0002911 or in connection with any appeal of the judgment in the that
7 Action;

8 2) Award New York Marine its costs; and

9 3) Grant such further relief as this Court deems just and proper.

10

11 Dated: July 11, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

12

13

By: /s/ James P. Wagoner

14

James P. Wagoner

15

Nicholas H. Rasmussen

16

Graham A. Van Leuven

17

Attorneys for Plaintiff New York Marine and
General Insurance Company

18

JURY DEMAND

19

20 Defendant and Counterclaimant NEW YORK MARINE hereby demands a jury
21 trial to the fullest extent facilitated by law.

22

Dated: July 11, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

23

By: /s/ James P. Wagoner

24

James P. Wagoner

25

Nicholas H. Rasmussen

26

Graham A. Van Leuven

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Attorneys for Plaintiff New York Marine and
General Insurance Company

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff and Counterclaim-Defendant,

v.

AMBER LAURA HEARD,

Defendant and Counterclaim-Plaintiff.

Civil Action No.: CL-2019-0002911

JUDGMENT ORDER

THIS MATTER came to be heard before a jury in this Court beginning on April 11, 2022 and continuing day to day April 11-14, April 18-21, April 25-28, May 2-5, May 16-19, May 23-27, with the jury deliberating May 27, May 31 and returning a verdict on June 1, 2022. Before the jury were three counts of defamation brought by the Plaintiff John C. Depp, II ("Mr. Depp"), and one count of defamation brought by the Defendant and Counterclaim Plaintiff, Amber Laura Heard ("Ms. Heard").

At the conclusion of the trial and deliberations, the jury returned a verdict in favor of Mr. Depp on all three remaining defamation counts, and awarded Mr. Depp \$10 million in compensatory damages and \$5 million in punitive damages, and a verdict in favor of Ms. Heard on her defamation count, and awarded Ms. Heard \$2 million in compensatory damages. The jury verdict is hereby incorporated into this Order by reference and made a part of this Order. It is therefore

ORDERED that the jury verdict of \$5,000,000 in punitive damages in favor of Mr. Depp is hereby reduced to \$350,000, the statutory cap pursuant to Virginia Code § 8.01-38.1; and it is further

2-21-22 11:20 AM 12/22/22

ORDERED that with respect to the Complaint, Judgment is hereby ENTERED in favor of Mr. Depp against Ms. Heard in the amount of \$10,350,000, with interest at the statutory rate of 6% per annum from the date of this Order; and it is further

ORDERED that with respect to the Counterclaim, Judgment is hereby ENTERED in favor of Ms. Heard against Mr. Depp in the amount of \$2,000,000, with interest at the statutory rate of 6% per annum from the date of this Order.

THIS ORDER IS FINAL.

ENTERED this 24 day of June, 2022.



The Honorable Penny S. Azarato
Chief Judge, Fairfax Circuit Court

Compliance with Rule 1:13 requiring the endorsement of counsel of record is modified by the Court, in its discretion, to permit the submission of the following electronic signatures of counsel in lieu of an original endorsement.

7

SEEN AND EXCEPTED TO for the reasons set forth in the record, stated at trial and in the objections attached hereto as Exhibit A:

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Counsel for Plaintiff and Counterclaim Defendant John C. Depp, II

SEEN AND EXCEPTED TO for the reasons set forth in the record and in the post-trial



86882)

David E. Murphy (VSB No. 90938)

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Counsel for Defendant and Counterclaim Plaintiff Amber Laura Heard

EXHIBIT A**Plaintiff and Counterclaim Defendant John C. Depp, II's Objections to the Final Order**

Plaintiff and Counterclaim Defendant John C. Depp, II objects to the Final Order on the following grounds:

- All reasons stated in oral and written arguments in Mr. Depp's Demurrers, Pleas in Bar, Motions for Summary Judgment, and Motions to Strike.
- All reasons stated in oral and written arguments in Mr. Depp's motions, jury instructions, and motions *in limine*.
- The Court's legal finding that Ms. Heard could prove actual malice by relying on the *mens rea* of either Mr. Depp or Mr. Waldman and permitting Ms. Heard to argue the same to the jury in closing.
- The Court's failure to exclude inadmissible hearsay statements.
- The Court's refusal to sustain Mr. Depp's objection to improper argument made by Ms. Heard's counsel during closing argument and motion for a curative instruction. Ms. Heard's improper argument at closing told jurors that a finding in favor of Mr. Depp would send a message to "every victim of domestic abuse everywhere," which is an improper invitation to jurors to decide the case on larger social issues and to place themselves in the shoes of Ms. Heard when reaching their verdict instead of basing their verdict on the evidence presented.
- The jury's finding of defamation by Mr. Depp as to the statement made by Adam Waldman that "Quite simply this was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911" as contrary to the law and unsupported by the facts.
- The jury's award of \$2,000,000 in favor of Ms. Heard against Mr. Depp in connection with the jury's finding of defamation was excessive and not supported by the facts.
- All other objections by Mr. Depp stated in oral or written argument in the record of this matter.

SPECIAL VERDICT FORM**Mr. Depp's Claim Against Ms. Heard**

This special verdict form includes each of the statements on which **John C. Depp, II** bases his claim of defamation against **Amber Heard**. Answer the questions in accordance with the Court's instructions.

1. As to this statement appearing in the online op-ed, entitled "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change" in the *Washington Post's* online edition:

"I spoke up against sexual violence—and faced our culture's wrath. That has to change."

1(a). Do you find that Mr. Depp has proven all the elements of defamation?

ANSWER YES OR NO: Yes

If you answer question 1(a) "NO," please proceed to question 2.

If you answered "YES," please answer YES or NO to the following questions: Has Mr. Depp proven by a greater weight of the evidence that:

The statement was made or published by Ms. Heard? Yes

The statement was about Mr. Depp? Yes

The statement was false? Yes

The statement has a defamatory implication about Mr. Depp? Yes

The defamatory implication was designed and intended by Ms. Heard? yes

Due to circumstances surrounding the publication of the statement, it conveyed a defamatory implication to someone who saw it other than Mr. Depp? yes

1(b). If you answered "YES" to each subpart of question 1(a), answer the following question: do you find that Mr. Depp has proven by clear and convincing evidence that Ms. Heard acted with actual malice?

ANSWER YES OR NO: yes

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2. As to this statement appearing in the op-ed entitled "*A Transformative Moment For Women*" in the *Washington Post*'s print edition and the online op-ed "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change" in the *Washington Post*'s online edition:

"Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out."

2(a). Do you find that Mr. Depp has proven all the elements of defamation?

ANSWER YES OR NO: yes

If you answer question 2(a) "NO," please proceed to question 3.

If you answered "YES," please answer YES or NO to the following questions: Has Mr. Depp proven by a greater weight of the evidence that:

The statement was made or published by Ms. Heard? yes

The statement was about Mr. Depp? yes

The statement was false? yes

The statement has a defamatory implication about Mr. Depp? yes

The defamatory implication was designed and intended by Ms. Heard? yes

Due to circumstances surrounding the publication of the statement, it conveyed a defamatory implication to someone who saw it other than Mr. Depp? yes

2(b). If you answered "YES" to each subpart of question 2(a), answer the following question: do you find that Mr. Depp has proven by clear and convincing evidence that Ms. Heard acted with actual malice?

ANSWER YES OR NO: yes

3. As to this statement appearing in the op-ed entitled "*A Transformative Moment For Women*" in the *Washington Post*'s print edition and the online op-ed "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change" in the *Washington Post*'s online edition:

"I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse."

3(a). Do you find that Mr. Depp has proven all the elements of defamation?

ANSWER YES OR NO: Yes

If you answer question 3(a) "NO," please proceed to question 4.

If you answered "YES," please answer YES or NO to the following questions: Has Mr. Depp proven by a greater weight of the evidence that:

The statement was made or published by Ms. Heard? Yes

The statement was about Mr. Depp? Yes

The statement was false? Yes

The statement has a defamatory implication about Mr. Depp? Yes

The defamatory implication was designed and intended by Ms. Heard? Yes

Due to circumstances surrounding the publication of the statement, it conveyed a defamatory implication to someone who saw it other than Mr. Depp? Yes

3(b). If you answered "YES" to each subpart of question 3(a), answer the following question: do you find that Mr. Depp has proven by clear and convincing evidence that Ms. Heard acted with actual malice?

ANSWER YES OR NO: Yes

Complete Questions 4-5 ONLY if you answered YES to all of questions 1, 2, or 3:

4. As against Amber Heard, state the amount of compensatory damages, if any, you believe John C. Depp, II has proven, by a greater weight of the evidence, that he is entitled to recover:

We, the Jury, award compensatory damages in the amount of \$ 10 million.

5. As against Amber Heard state the amount of punitive damages, if any, to which you find John C. Depp, II is entitled to recover:

We, the Jury, award punitive damages in the amount of \$ 5 million.

June 1st, 2022
DATE


SIGNATURE OF FOREPERSON


PRINTED NAME OF FOREPERSON

SPECIAL VERDICT FORM

Ms. Heard's Claim Against Mr. Depp

This special verdict form includes each of the statements on which Amber Heard bases her claim of defamation against John C. Depp, II. Answer the questions in accordance with the Court's instructions.

1. As to this statement appearing in the April 8, 2020 online edition of *The Daily Mail*:

"Amber Heard and her friends in the media use fake sexual violence allegations as both a sword and shield, depending on their needs. They have selected some of her sexual violence hoax 'facts' as the sword, inflicting them on the public and Mr. Depp."

- 1(a). Do you find that Ms. Heard has proven all the elements of defamation?

ANSWER YES OR NO: No

If you answer question 1(a) "NO," please proceed to question 2.

If you answered "YES," please answer YES or NO to the following questions: Has Ms. Heard proven by a greater weight of the evidence that:

Mr. Waldman, while acting as an agent for Mr. Depp, made or published the statement? _____

The statement was about Ms. Heard? _____

The statement was seen by someone other than Ms. Heard? _____

The statement was false? _____

1(b). If you answered "YES" to each subpart of question 1(a), answer the following question: do you find that Ms. Heard has proven by clear and convincing evidence that the statement by Mr. Waldman was made with actual malice?

ANSWER YES OR NO: _____

2. As to this statement appearing in the April 27, 2020 online edition of *The Daily Mail*:

"Quite simply this was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911."

2(a). Do you find that Ms. Heard has proven all the elements of defamation?

ANSWER YES OR NO: yes

If you answer question 2(a) "NO," please proceed to question 2.

If you answered "YES," please answer YES or NO to the following questions: Has Ms. Heard proven by a greater weight of the evidence that:

Mr. Waldman, while acting as an agent for Mr. Depp, made or published the statement? yes

The statement was about Ms. Heard? yes

The statement was seen by someone other than Ms. Heard? yes

The statement was false? yes

2(b). If you answered "YES" to each subpart of question 2(a), answer the following question: do you find that Ms. Heard has proven by clear and convincing evidence that the statement by Mr. Waldman was made with actual malice?

ANSWER YES OR NO: yes

3. ...to this statement appearing in the April 27, 2020 online edition of *The Daily Mail*:

"[W]e have reached the beginning of the end of Ms. Heard's abuse hoax against Johnny Depp."

3(a). Do you find that Ms. Heard has proven all the elements of defamation?

ANSWER YES OR NO: No
If you answer question 3(a) "NO," please proceed to question 4.

If you answered "YES," please answer YES or NO to the following questions: Has Ms. Heard proven by a greater weight of the evidence that:

Mr. Waldman, while acting as an agent for Mr. Depp, made or published the statement? _____

The statement was about Ms. Heard? _____

The statement was seen by someone other than Ms. Heard? _____

The statement was false? _____

3(b). If you answered "YES" to each subpart of question 3(a), answer the following question: do you find that Ms. Heard has proven by clear and convincing evidence that the statement by Mr. Waldman was made with actual malice?

ANSWER YES OR NO: _____

Complete Questions 4-5 ONLY if you answered YES to all of questions 1, 2, or 3.

4. As against John C. Depp, II, state the amount of compensatory damages, if any, you believe Amber Heard has proven, by a greater weight of the evidence, that she is entitled to recover:

We, the Jury, award compensatory damages in the amount of \$ 2 million.

5. As against John C. Depp, II, state the amount of punitive damages, if any, you to which you find Amber Heard is entitled to recover:

We, the Jury, award punitive damages in the amount of \$ 0.

June 1st, 2022
DATE

[REDACTED]
SIGNATURE OF FOREPERSON

[REDACTED]
PRINTED NAME OF FOREPERSON

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

New York Marine and General Insurance Company

CASE NUMBER

2:22-cv-04685 RSWL(GJSx)

v.

PLAINTIFF(S)

Amber Heard

**ORDER RE TRANSFER PURSUANT
TO GENERAL ORDER 21-01
(RELATED CASES)**

DEFENDANT(S).

CONSENT

I hereby consent to the transfer of the above-entitled case to my calendar, pursuant to General Order 21-01.

July 12, 2022

Date

George H. Wu

United States District Judge

DECLINATION

I hereby decline to transfer the above-entitled case to my calendar for the reasons set forth:

Date

United States District Judge

REASON FOR TRANSFER AS INDICATED BY COUNSEL

Case 2:21-cv-05832 GW(PDx) and the present case:

- ☐ A. Arise from the same or closely related transactions, happenings or events; or
- ☒ B. Call for determination of the same or substantially related or similar questions of law and fact; or
- ☒ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
- ☐ D. Involve one or more defendants from the criminal case in common, and would entail substantial duplication of labor if heard by different judges (applicable only on civil forfeiture action).

NOTICE TO COUNSEL FROM CLERK

Pursuant to the above transfer, any discovery matters that are or may be referred to a Magistrate Judge are hereby transferred from Magistrate Judge Standish to Magistrate Judge Donahue.

On all documents subsequently filed in this case, please substitute the initials GW(PDx) after the case number in place of the initials of the prior judge, so that the case number will read 2:22-cv-04685 GW(PDx). This is very important because the documents are routed to the assigned judges by means of these initials

cc: ☐ Previous Judge ☐ Statistics Clerk

CV-34 (03/21)

ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 21-01 (Related Cases)